FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 11 1961
JAMES R. BROWNING, Clerk

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 957

Bill Hoover,
Petitioner,

VERSUS

Oklahoma Turnpike Authority,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Charles R. Nesbitt,
1909 First National Building,
Oklahoma City, Oklahoma.
Counsel for Petitioner.

May, 1961.

Utterback Typesetting Co., 13 So. Walker, Oklahoma City, Ph. CE 5-8780

SUBJECT INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257	2
The Question Presented	3
Constitutional Provision Involved	3
Statement of the Case	3
I. History of the Case, and Issues Involved and Adjudicated	3
The Application of Respondent and Protest of Petitioner	4
Legal and Factual Issues Invoked	5
Petitioner's Request for Hearing, and Denial Thereof	7
Decision and Opinion of the Supreme Court of Oklahoma	9
Issues of Fact Decided After Denial to Petitioner of a Hearing Thereon	10
Proceedings Upon Rehearing	13
II. Manner in Which Federal Question Was Raised and Preserved in Proceedings Below	14
Reasons Relied Upon for Allowance of Writ of Certiorari	18
Arguments in Support of Reasons Relied Upon for Allowance of Writ	18

INDEX CONTINUED PAGE.

Proposition I: The action of the Supreme Court of Oklahoma in deciding material issues of fact necessarily involved in the controversy, after denying petitioner an opportunity to present evidence and testimony thereon, infringed the Due Process Clause of the XIV Amendment to the United States Constitution 18

Conclusion 24

AUTHORITIES.

CASES:

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107 19, 20

Eckerle v. Ferris, 175 Okla. 107, 51 P.2d 766 23

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431 19, 20, 21

Morgan v. U. S., 298 U.S. 468, 56 Sup. Ct. 906, 80 L. Ed. 1288 21

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 Sup. Ct. 724, 81 L. Ed. 1093 19, 21, 22

Ownbey v. Morgan, 256 U.S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837 20

Postal Telegraph Cable Co. v. City of Newport, Ky., 247 U.S. 464, 38 Sup. Ct. 566, 67 L. Ed. 1215 19

Powell v. State of Alabama, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 19, 21

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 58 Sup. Ct. 334, 82 L. Ed. 319 19

INDEX CONTINUED

PAGE

St. Joseph Stockyards Co. v. U. S., 298 U.S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033 19

Speiser v. Randall, 357 U.S. 513, 78 Sup. Ct. 1332, 2 L. Ed.2d 1460 21

Standard Oil Co. v. Missouri, 224 U.S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760 20

State Highway Commission v. Green-Boots Const. Co., 199 Okla. 477, 187 P.2d 209 23

STATUTES:

28 U.S.C., Sec. 1257 2

28 U.S.C., Sec. 1257 (3) 2

69 O.S. (1959 Supp.), Sec. 655 10

69 O.S. (1959 Supp.), Sec. 655(e) 5, 7

69 O.S. (1959 Supp.), Sec. 655 (e) (4) 12

69 O.S. (1959 Supp.), Sec. 659 7, 13

69 O.S. (1959 Supp.), Sec. 668 2, 4, 22

MISCELLANEOUS:

United States Constitution, 14th Amendment 3, 8, 14, 15, 16, 17, 18, 21, 24

Greenleaf "Evidence" (16th Ed.), p. 18 22

Wigmore "Evidence," Sec. 2567 22

APPENDIX I

STATUTES:

69 O.S. (1959 Supp.), Sec. 653(a) i

69 O.S. (1959 Supp.), Sec. 655(e) i-iii

69 O.S. (1959 Supp.), Sec. 659 iii

69 O.S. (1959 Supp.), Sec. 668 iv

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

BILL HOOVER,
Petitioner,

VERSUS

OKLAHOMA TURNPIKE AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, Bill Hoover, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, entered in this cause upon January 26, 1961.

OPINIONS BELOW

The majority opinion of the Supreme Court of Oklahoma is reported in 359 Pacific 2d 680. Two specially concurring opinions are reported respectively at 359 P.2d 698, and at 359 P.2d 699. Opinion concurring in part and dissenting in part is reported at 359 P.2d 699. Order Denying Motion for Rehearing and Motion to Vacate is reported at 359 P.2d 702. Dissent to denial of rehearing is reported at 359 P.2d 702.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257. The following facts sustain the jurisdiction of this Court:

(1) The judgment herein sought to be reviewed was dated and entered on January 26, 1961 (Appendix, Exhibit A, i-xxxviii).

(2) Petitions for rehearing were denied by order dated February 13, 1961, filed on February 14, 1961 (Appendix, Exhibit B, xlix). Further order in the nature of a denial of petitioner's petition for rehearing and reconsideration was dated February 21, 1961, and filed March 1, 1961 (Appendix, Exhibit C, li).

(3) Jurisdiction to review the judgment of the Supreme Court of Oklahoma by certiorari is conferred upon this Court by 28 U.S.C., Sec. 1257 (3). The Supreme Court of Oklahoma is the highest appellate court of the State of Oklahoma, and is the highest court of that State in which decision could be had. The cause here involved was an original action filed in the Supreme Court of Oklahoma, pursuant to special statute granting the Supreme Court of Oklahoma exclusive original jurisdiction to hear and determine the cause (69 O.S. [1959 Supp.] Sec. 668). The judgment of which review is sought is a final judgment of the Supreme Court of Oklahoma.

THE QUESTION PRESENTED

Did the action of the Supreme Court of Oklahoma in persistently denying petitioner a trial or hearing to present evidence and testimony upon questions and issues of fact, determination of which was essential to decision of the questions of law involved in the controversy, constitute an infringement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution, reading:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

State statutes cited herein are printed as an appendix to this Petition.

STATEMENT OF THE CASE

The essential facts relating to the controversy here for review, and the preservation of the federal constitutional question in state court proceedings, are as follows:

I. History of the Case, and Issues Involved and Adjudicated

This was an original action filed in the Supreme Court of Oklahoma on October 1, 1960, by respondent, Oklahoma Turnpike Authority, seeking validation and approval of certain proposed revenue bonds for construction of two toll roads in the State of Oklahoma and seeking approval

of the trust indenture under which those bonds were proposed to be issued. The proposed bond issues totalled $90,000,000.00.

Respondent Authority is an agency of the State, created for the purpose of constructing and operating toll roads (69 O.S. [1959 Supp.] Secs. 653, 655). Respondent is authorized by law to seek judicial approval of any bonds it proposes to issue to finance construction of toll roads. Exclusive original jurisdiction is conferred upon the Supreme Court to hear and determine each such application. Notice must be given informing all persons interested that they may file protests against the issuance of the bonds, and be present at the hearing to contest the legality thereof (69 O.S. [1959 Supp.] Sec. 668).

The Application of Respondent and Protest of Petitioner

The Application of Respondent propounded a series of questions of law and fact for answer by the Supreme Court in connection with approval of the proposed bonds. Excerpt from the Application setting out those questions appears at Appendix, Exhibit D, liii-lvii. Respondent prayed that upon hearing, the bonds and all proceedings leading to their issue be approved, and that the questions propounded be formally answered in the opinion.

On October 13, 1960, petitioner filed a timely Protest, Objection and Contest to the Application (Appendix, Exhibit E, lviii-lxvii). The protest of petitioner challenged the validity of the proposed bond issues, and the regularity of proceedings under which issued. Petitioner took

legal and factual issue with each of the questions propounded, and submitted counter-questions of law and fact for answer in connection with the answers to respondent's questions.

Legal and Factual Issues Involved

Briefly stated, the legal and factual issues involved in the proceeding in the Supreme Court of Oklahoma were:

(a) Petitioner sought judicial determination that its official actions in locating the routes for the toll roads, and the authorization and issuance of the bonds and trust indenture, were valid, and in conformity with applicable law. Petitioner challenged the regularity and validity of all proceedings of respondent in the matter. Specifically, petitioner challenged upon factual grounds the determination by respondent that each proposed turnpike was "feasible and economically sound." By law, the respondent is authorized to construct toll roads at locations generally outlined in the statute, "at such locations and on such routes as it shall determine to be feasible and economically sound" (69 O.S. [1959 Supp.] Sec. 655[e]). Petitioner alleged that respondent's determination that each proposed route was "feasible and economically sound" was wholly without basis in fact, and was directly contrary to all available engineering and scientific data. Thus, respondent's official determination that each proposed toll road was "feasible and economically sound" was arbitrary, and constituted an abuse of its lawful discretion. Whether respondent abused its discretion in approving and locating the proposed routes was primarily a question of fact.

Whether the official actions of respondent were otherwise regular and in compliance with law was also a question of fact.

(b) Respondent sought a determination that the holders of bonds hereafter issued under the trust indenture submitted for approval would have an irrevocable and vested contract right in the continued apportionment of certain state gasoline tax revenues to secure payment of interest on the bonds; and in the continued collection of tolls upon other turnpikes after their own bonds are retired, and dedication of that income to pay these bonds. These issues raised questions of law under the statutes and Constitution of Oklahoma, and the rulings of the Supreme Court of Oklahoma thereon form no part of the issues here for review.

(c) Respondent sought a determination of the validity and enforceability of certain contracts entered into between the respondent Oklahoma Turnpike Authority, and the Oklahoma Department of Highways, whereby the latter agreed to build with state funds certain highways and access roads leading to each of the proposed turnpikes, if and when the turnpikes were constructed. The contracts were attached to the application, and their provisions and obligations were incorporated in the trust indenture for the benefit of purchasers of the bonds. The road projects involved would cost some $30,000,000.00 to construct. Petitioner challenged the validity of the contracts under the Constitution and laws of Oklahoma. In particular, petitioner contended that all or portions of the roads covered by the contracts were "access roads, interchanges or lead

roads," which by specific statute must be constructed exclusively by the Turnpike Authority from its own funds (69 O.S. [1959 Supp.] Sec. 655[e]). The nature of each proposed road project, and whether it constituted an "access road, interchange or lead road" within the statutory definition, was primarily a question of fact.

(d) Respondent sought approval of its official actions combining the two turnpikes into one project for financing purposes. By statute, the respondent Authority "may in its discretion, where it finds it would be economical and beneficial to do so, combine two or more . . . projects into one unit" (69 O.S. [1959 Supp.] Sec. 659). Petitioner challenged the validity and regularity of the Authority's proceedings in this connection, and contended that respondent did not in fact by valid official action combine the projects into one unit at all. Again, this issue presented primarily questions of fact.

(e) Other minor and subsidiary issues were involved, which for the most part presented questions of state law, and are not pertinent to this proceeding.

Petitioner's Request for Hearing, and Denial Thereof

Since determination of the various issues of fact was essential to decision of the questions of law involved in the proceeding, petitioner filed an Application for Reference to a Referee for Taking of Evidence and Testimony Upon Issues of Fact (Appendix, Exhibit F, lxvii-lxix). Therein, petitioner called attention of the Court to the issues of fact involved in the controversy, and requested

an opportunity to present relevant evidence and testimony of witnesses in support of his contentions upon the issues of fact. Taking of evidence by a referee was deemed the method least burdensome upon the Court and the Justices. Petitioner's application for reference was denied by Order of October 17, 1960 (Appendix, Exhibit G, lxx).

On October 21, 1960, petitioner filed an Application to Vacate and Set Aside the Order of October 17, 1960, denying a hearing or reference (Appendix, Exhibit H, lxxi). Petitioner reiterated that important questions of fact were present in the controversy upon each of which the presentation of evidence and testimony was essential to determination thereof, and to decision upon questions of law. Petitioner raised the constitutional issue, that denial to petitioner of a full and fair hearing upon essential issues of fact would violate the Due Process Clause of the XIV Amendment to the Federal Constitution.

Petitioner's motion to vacate the earlier order denying a hearing was also denied by Order of October 31, 1960 (Appendix, Exhibit I, lxxiv-lxxv). The basis of the denial was that the "instruments, agreements and contracts executed in connection with the proposed issuance of Turnpike Revenue Bonds amply set forth all of the facts that will be necessary for a disposition of the questions presented." If not, the Court said, "it might later direct a reference for taking testimony."

Meanwhile, other persons had filed a separate suit in the District Court of Oklahoma County, seeking to enjoin the Highway Department from carrying out its contracts to build turnpike connecting roads. The issues of law and

fact raised there as to the validity of the contracts were substantially identical to the issues here. Upon application of respondent, the Supreme Court of Oklahoma stayed proceedings in the District Court case, and directed the plaintiffs there to appear, if at all, in this proceeding. Thus, petitioner, and all other persons appearing anywhere adverse to the respondent Authority, were denied the opportunity to present evidence in support of their contentions in any forum.

There was never any hearing, and no opportunity was afforded petitioner to present evidence and testimony of witnesses upon the issues of fact raised by the pleadings. The parties filed briefs as directed, and the cause was argued orally before the Supreme Court of Oklahoma.

Decision and Opinion of the Supreme Court of Oklahoma

On January 26, 1961, the Supreme Court of Oklahoma filed its opinion and decision in the cause (Appendix, Exhibit A, i). In the majority opinion, each of the questions of fact referred to above was directly adjudicated; and each was decided adversely to petitioner's contentions. Most of the questions of fact were decided directly; and in other cases the opinion assumed the existence of certain facts as a necessary basis for its conclusions of law. In every instance, the facts decided or assumed were directly contrary to what petitioner repeatedly sought an opportunity to prove by evidence and testimony.

Issues of Fact Decided After Denial to Petitioner of a Hearing Thereon

The majority opinion undertook to review and approve the proceedings under which the bonds and trust indenture were issued, and the determination by respondent that the respective projects were "feasible and economically sound." The Court recognized that an issue of fact was presented when petitioner challenged the respondent Authority's finding that one or both of the proposed toll roads were "feasible and economically sound." It conceded that the statute permits construction of turnpikes only at locations the Authority determines to be "feasible and economically sound" (69 O.S. [1959 Supp.] Sec. 655) (Appendix, xii). It recognized that such determination involves exercise of discretion by respondent Authority, and stated that "the Authority should observe the best tests, checks, studies and reports available or obtainable in a persistent effort to thoroughly test feasibility and economic soundness, and then apply its official discretion" (Appendix, xiii).

The opinion then concluded: "It appears to us from the record that the Authority so proceeded in this instance, and we cannot say at all that its conclusion was not justified." As to the "record" upon which the finding is based, the Court stated that "the actions and proceedings of the Authority are adequately shown by minutes of meetings, and documents executed or approved by the Authority," and concluded that "all this showing is ample to direct . . ." approval of the proceedings (Appendix, xii, xiii).

By this ruling, the Court adjudicated the first of the precise questions of fact upon which petitioner unsuccessfully sought a hearing to present evidence and testimony contrary to the "showing" of respondent. Petitioner sought a hearing to prove the Authority did not in fact "observe the best tests, checks, studies and reports available," and that if it had, the evidence and data before it would conclusively establish the economic unsoundness of the projects. Under such conditions, approval of the projects and the routes would be without basis in fact, and would constitute an abuse of discretion. Whether a state agency has abused its lawful discretion in any official determination is a question purely of fact. The Supreme Court of Oklahoma decided this issue of fact in favor of the respondent. In doing so, the Court received the evidence of the respondent Authority in support of the regularity and legality of its actions, but denied petitioner an opportunity to present any evidence to the contrary. In short, the Court accepted one litigant's proof upon this issue of fact, while denying the opposing party any chance to offer proof to the contrary.

The majority opinion likewise decided that none of the specific connecting road projects in fact constituted "access roads, interchanges or lead roads" within the terms of the statute requiring such roads to be built exclusively by the respondent Authority (Appendix, xxiii). Again, the Court recognized that a question of fact was presented. It cited the statute providing that "all access roads, interchanges, or lead roads connecting such turnpikes with existing highways must be built by funds furnished by

the Turnpike Authority" (69 O.S. [1959 Supp.] Sec. 655 [e] [4]); and referred to petitioner's contention that "these facilities will constitute lead roads or access roads," which "should be constructed and paid for by the Turnpike Authority," and that it is illegal for the Highway Department to construct and pay for the roads with public funds. The Court itself stated the question of fact in this language: "So, the question occurs whether these highway facilities are to be included in the term of 'access roads or lead roads' so connecting with such turnpike" (Appendix, xxiv).

The Court then proceeded to decide this question of fact. It found that none of the connecting road projects in fact constituted "access roads, interchanges or lead roads" within the statutory definition. The finding was made from the "drawings, minutes, actions, resolutions and agreements of the Highway Commission," that is to say, solely from documents submitted by respondent in support of its Application (Appendix, xxiv). The Court said "it is clearly shown" that the roads were to be used by turnpike patrons, and also by persons not entering the turnpike (Appendix, xxiv). Petitioner had sought to prove the contrary. The Court held that the Federal Government would participate in the building of the roads (Appendix, xxv). Petitioner had sought an opportunity to prove it would not. The Court construed the statute to mean that the respondent Authority was required to build only access roads to be used "exclusively" by turnpike patrons (Appendix, xxvi). Petitioner had sought to prove that some of the specific road projects were "access roads or lead roads" even under that construction.

Thus, again, the Supreme Court of Oklahoma decided material questions of fact upon the record formed solely by evidence offered by respondent, while denying petitioner any opportunity to offer evidence and testimony to the contrary.

The majority opinion of the Supreme Court of Oklahoma further decided that the actions and proceedings of the respondent in combining the two turnpike projects into a single unit for financing purposes was in fact valid and in compliance with applicable law (69 O.S. [1959 Supp.] Sec. 659) (Appendix, xxxi). This finding was made solely upon the record offered by respondent. Petitioner had sought an opportunity to prove by evidence and testimony that the actions of the respondent Authority relating to combining the projects were not in compliance with the statute; and in fact there had been no lawful official action whatever in that regard. Thus, the Court once again made findings of fact favorable to respondent, having denied petitioner any opportunity to present his evidence and testimony on the issue (Appendix, xxxv).

Proceedings Upon Rehearing

Both petitioner and respondent filed petitions for rehearing within the period of five days allowed by the Supreme Court of Oklahoma. All petitions for rehearings were denied by order dated February 13, 1961, filed February 14, 1961. Respondent filed application for Leave to File Second Petition for Rehearing on February 15, 1961, which was denied on March 1, 1961. On the same day, further order was entered finally denying petitioner's ap-

plication for order of reference to take evidence and testimony upon the issues of fact involved (Appendix, Exhibit C, li).

II. Manner in Which Federal Question Was Raised and Preserved in Proceedings Below

By his Application for Reference, filed Ocober 17, 1960, petitioner sought a trial or hearing upon the controverted issues of fact necessarily involved in the controversy, and essential to decision of the questions of law (Appendix, Exhibit F, lxvii). The application was denied by Order of October 17, 1960 (Appendix, Exhibit G, lxx).

On October 21, 1960, petitioner filed his Motion to Vacate the Order of October 17, 1960, and for Rehearing and Reconsideration of His Application for Reference (Appendix, Exhibit H, lxxi). In support of this motion, Petitioner raised the precise federal constitutional question urged here. Petitioner called attention of the Supreme Court of Oklahoma to the fact that numerous controverted issues of fact were raised by the pleadings, upon each of which presentation of evidence and testimony was essential. Petitioner pointed out that denial of a hearing, or opportunity to offer evidence and testimony upon these issues of fact denied him a fair trial, and a full and fair hearing (Appendix, lxxii).

Petitioner pointed out that such denial of a trial or hearing upon material controverted issues of fact would infringe the Due Process Clause of the XIV Amendment to the United States Constitution; and that "the action of the Court in denying Protestant's Application for Refer-

ence . . . violates and contravenes the Constitution of the United States, and in particular, the due process clause of the XIV Amendment to the United States Constitution; and such action and order is unconstitutional, null and void" (Appendix, lxxii). This motion was denied by Order of October 31, 1960 (Appendix, Exhibit I, lxxiv) which denial was reiterated by further Order dated February 21, 1961, filed March 1, 1961 (Appendix, Exhibit C, li).

Decision and opinion on the merits was filed on January 26, 1961, which undertook to decide the issues of fact upon which petitioner unsuccessfully had sought a hearing, and an opportunity to present evidence and testimony.

On January 31, 1961, petitioner filed a timely Petition for Rehearing, again raising the constitutional issue in identical terms (Appendix, Exhibit J, lxxvi). In his Petition for Rehearing, petitioner called attention of the Supreme Court of Oklahoma to the fact that denial of a trial or hearing upon issues of fact contravened the Due Process Clause of the XIV Amendment to the United States Constitution (Appendix, lxxvii). Petitioner pointed out that the decision and opinion of the Court of January 26, 1961, decided the issues of fact herein described, as an essential basis for decision upon issues of law. These were the issues of fact upon which petitioner unsuccessfully sought opportunity to present evidence and testimony.

In his Petition for Rehearing, petitioner raised the constitutional issue of due process in connection with each of the specific questions of fact which were actually decided by the Supreme Court of Oklahoma, after denying petitioner a hearing thereon. Petitioner pointed out that

the action of the Court in reviewing and upholding the exercise of discretion by the respondent Authority in determining the proposed routes to be "feasible and economically sound," while denying petitioner an opportunity to prove the contrary, violated the Due Process Clause of the XIV Amendment to the United States Constitution (Appendix, lxxviii).

Petitioner pointed out that the decision of the Supreme Court of Oklahoma holding the specific road projects involved were not in fact "access roads, interchanges or lead roads" within the statutory requirement that such roads be built exclusively by the respondent Authority, after having denied petitioner an opportunity to prove the contrary by evidence and testimony, also contravened the Due Process Clause (Appendix, lxxix).

Petitioner pointed out that the decision approving the official actions of respondent in combining the two projects into one unit, after denying petitioner an opportunity to prove the invalidity of those proceedings, also contravened the Due Process Clause of the United States Constitution (Appendix, lxxix).

Petition for Rehearing was denied by Order dated February 13, 1961, and filed February 14, 1961. In the Order denying Petition for Rehearing, the Court stated that "the Court does not observe any material issue of fact in this case which could properly have been the subject of evidence or reference herein," and that "the Court finds that there are not and were not issues of fact to be determined herein between the applicant and any of the protestants or parties" (Appendix xlix).

The same Order stated that "the petitions for rehearing do not specifically set out any such items relied upon as issues of fact," in spite of the fact that petitioner's Petition for Rehearing, as well as his earlier pleadings, set out in great detail the substantial issues of fact decided by the Court after denying petitioner a hearing thereon (Appendix, l).

Thereafter, by Order dated February 21, 1961, and filed March 1, 1961, the Court finally denied petitioner's motion to vacate and set aside order denying application for reference, upon the ground that "there were no fact questions presented necessitating the reference of the case to a Referee" (Appendix, li). The Court stated further that both in consideration of the merits, and upon rehearing, it had concluded that "there were no decisive and controlling issues of fact mentioned or presented which would make it necessary to refer the case to a Referee for the purpose of taking evidence and testimony."

At each appropriate stage in the proceedings, petitioner raised and urged the constitutional question presented here. At each stage, petitioner contended that the adjudication of questions of fact after denying petitioner an opportunity to present evidence and testimony thereon, contravened the XIV Amendment to the United States Constitution. As often, petitioner's applications were denied, upon the stated ground alone that no questions of fact were present in the controversy. In the decision, however, the Court recognized the existence of those questions of fact, and proceeded to decide them upon the "record" formed by respondent's evidence alone.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

(1) The Supreme Court of Oklahoma denied petitioner a trial or hearing, and denied him an opportunity to present evidence and testimony upon questions of fact essential to the adjudication of the issues herein, all in contravention of the Due Process Clause of the XIV Amendment to the United States Constitution.

(2) In denying petitioner a hearing, and in denying him due process of law in the proceedings, the Supreme Court of Oklahoma decided a federal constitutional question in a manner not in accord with the applicable decisions of this Court.

ARGUMENTS IN SUPPORT OF REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Argument of petitioner in support of allowance of Writ of Certiorari in this cause will be presented under a single proposition:

Proposition I.

The action of the Supreme Court of Oklahoma in deciding material issues of fact necessarily involved in the controversy, after denying petitioner an opportunity to present evidence and testimony thereon, infringed the Due Process Clause of the XIV Amendment to the United States Constitution.

Perhaps the most basic principle of jurisprudence in a democracy is that any litigant is entitled to a full and fair hearing—to his day in court—and the United States Constitution guarantees and protects that fundamental

right. The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.

—*Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 58 Sup. Ct. 334, 82 L. Ed. 319;

Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U.S. 292, 57 Sup. Ct. 724, 81 L. Ed. 1093;

St. Joseph Stockyards Co. v. *U. S.*, 298 U.S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033.

Due process requires that there be due notice, and an opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial.

—*Railroad Commission of California* v. *Pacific Gas & Electric Co.*, *supra*;

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431;

Powell v. *State of Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158.

The constitutional requirement of a fair and open hearing applies with equal or greater force to court proceedings than to administrative or executive action.

—*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107;

Postal Telegraph Cable Co. v. *City of Newport, Ky.* 247 U.S. 464, 38 Sup. Ct. 566, 67 L. Ed. 1215;

Powell v. *State of Alabama*, *supra*;

Standard Oil Co. v. *Missouri*, 224 U.S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760;

Ownbey v. *Morgan*, 256 U.S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837.

Especially is this true of an original proceeding in a court of first and last resort. There could be no appeal from the Supreme Court of Oklahoma upon the substantive issues involved in the cause. A litigant denied a hearing in original proceedings in the Supreme Court of Oklahoma is wholly without remedy. There can be no review of its decision, or the manner in which arrived at. Petitioner is remediless, unless he may successfully invoke the Due Process Clause of the Federal Constitution in this Petition for Certiorari. It is impossible to conceive a situation where the constitutional guaranty of due process in judicial proceedings is more important.

The requirement of a fair trial demands that a party have an opportunity to be heard, to present competent evidence in support of his contentions, and to rebut by his own proof the evidence submitted by his opponent. There is no fair hearing when one party is denied all opportunity to produce his own evidence, and to refute the evidence of his adversary.

—*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, *supra*.

Where rights depend upon facts, a finding without evidence is arbitrary and baseless, and cannot withstand

the Constitution's condemnation of all arbitrary exercise of power. A finding of fact upon the evidence of one party alone is no better, when the opposing party was denied an opportunity to produce evidence to the contrary.

—*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co., supra;*

Morgan v. *U. S.*, 298 U.S. 468, 56 Sup. Ct. 906, 80 L. Ed. 1288;

Ohio Bell Telephone Co. v. *Public Utilities Commission, supra.*

The outcome of litigation, and thus the vindication of legal rights, depends more often upon how the fact-finder appraises the facts, than upon the application and interpretation of statutes or case law. Thus, the procedures by which the facts are found are fully as important as the substantive rules of law to be applied.

—*Speiser* v. *Randall*, 357 U.S. 513, 78 Sup. Ct. 1332, 2 L. Ed.2d 1460;

Powell v. *State of Alabama, supra.*

It is for this reason that any attempted findings of fact by judicial or administrative fiat alone, without evidence to support them, consistently have been condemned as contravening the Due Process Clause of the XIV Amendment. Findings based solely upon the evidence or contentions of one party alone, when the opposing party has been denied a fair opportunity to produce evidence in support of his own contentions, and in rebuttal of his opponent's contentions, must be as positively condemned by the same provision of the Federal Constitution.

Nor can some notion of "judicial notice" serve as a substitute for a fair trial. Even those matters of which the Court may properly take judicial notice may be disputed by evidence if a party deems them disputable.

—*Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra;*

Wigmore "Evidence," Sec. 2567;

Greenleaf "Evidence" (16th Ed.), p. 18.

The fact that the substantive questions of law involved construction of state statutes, and the state constitution, does not render the denial of a hearing any less substantial a federal constitutional question. Petitioner was a person specifically entitled by statute to enter the proceedings as a party to challenge the validity of respondent's actions (39 O.S. [1959 Supp.] Sec. 668). As a citizen of Oklahoma, petitioner has a direct financial interest in the controversy, and the statute recognizes that interest. Ultimately the toll roads will belong to the citizens of Oklahoma. A citizen of the State is directly concerned about the feasibility and economic soundness of a toll road project, since state funds and revenues most likely will have to be used to support an economically unsound toll road project. The access roads proposed to be built by the State Highway Department must be constructed out of public tax revenues. All citizens of the State are equally interested in the controversy, and in the protection of their rights. Petitioner acts by law as a representative of the class. Thus, it was the people of Oklahoma who were denied due process of law in this cause in the Supreme Court of Oklahoma. No more important rights could have

been at stake; and no more essential could have been the requirement of due process of law in dealing with those rights. A more substantial federal constitutional question in denial of due process of law could not be conceived.

There can be no question that substantial controverted questions of fact were raised by the pleadings and were essential to the adjudication of the issues. Whether respondent complied with the law or abused its discretion in approval or location of routes, or in determining that either or both projects were "feasible and economically sound," or in combining two projects into one, all were questions of fact. The exercise of discretion by any state board or agency will be reviewed by the courts when the action was arbitrary or when the discretion has been abused.

—*Eckerle* v. *Ferris*, 175 Okla. 107, 51 P.2d 766;

State Highway Commission v. *Green-Boots Const. Co.*, 199 Okla. 477, 187 P.2d 209.

Whether any or all of the specific connecting road projects the Highway Department agreed to build constituted "access roads, lead roads or interchanges" within the statute requiring Respondent to build them was a question purely of fact. Since the contracts relating to those road projects were made part of the trust indenture, decision of this question was essential to approval of the bonds.

The Supreme Court of Oklahoma undertook to decide substantial controverted questions of fact in this cause. The very nature of the issues made adjudication thereof essential to decision upon the questions of law involved. In each

case, the Court took the word of respondent, a state governmental agency, for all the facts. This would have been bad enough even had no person appeared to protest. However, petitioner at every appropriate stage of the proceedings persistently sought an opportunity to prove by competent evidence and testimony that the controlling facts were contrary to what respondent claimed they were, and what the Court assumed they were. The Court not only refused to consider petitioner's evidence; it refused petitioner any opportunity to present it at all. This procedure does not accord with the traditional concepts of fair play and a fair hearing, and does not meet the standard of due process guaranteed every litigant as an inexorable safeguard.

Petitioner, and the people of Oklahoma, are wholly without remedy against the denial of a fair trial, and the arbitrary exercise of power, unless this Court shall by granting *certiorari* in this cause impose in the proceedings the safeguards of due process of law guaranteed every citizen by the XIV Amendment to the United States Constitution.

Therefore, petitioner respectfully requests that this Court cause a writ of *certiorari* to issue to the Supreme Court of the State of Oklahoma in this cause.

CHARLES R. NESBITT,
1909 First National Building,
Oklahoma City, Oklahoma.

Counsel for Petitioner.

May, 1961.

APPENDIX I

69 O.S. (1959 Supp.), Sec. 653

§ 653. Oklahoma Turnpike Authority created—Corporate body—Instrumentality of state—Liabilities—Members—Officers—Surety bonds—No compensation except expenses

(a) There is hereby created a body corporate and politic to be known as the "Oklahoma Turnpike Authority," and by that name the Authority may sue and be sued, and plead and be impleaded. The Authority is hereby constituted an instrumentality of the State, and the exercise by the Authority of the powers conferred by this Act in the construction, operation, and maintenance of turnpike projects shall be deemed and held to be an essential governmental function of the State with all the attributes thereof. Provided, however, the Turnpike Authority is authorized to carry and shall carry liability insurance to the same extent and in the same manner as the State Highway Commission, and in addition thereto it shall be subject to the Workmen's Compensation Laws of the State the same as a private construction project.

* * * * * * *

69 O.S. (1959 Supp.), Sec. 655

§ 655. Authority—Powers—Bonds—Tolls—Contracts

The Authority is hereby authorized and empowered:

* * * * * * *

(e) To construct, maintain, repair and operate turnpike projects and highways, with their access and connecting roads, at such locations and on such routes as it shall determine to be feasible and economically sound; provided that until specifically authorized by the Legislature, the Authority shall be authorized to construct and operate toll turnpikes only at the following locations:

(1) The Turner Turnpike between Oklahoma City and Tulsa.

(2) That part in Oklahoma of a turnpike between a connection with the Turner Turnpike near the Oklahoma City Terminus and Wichita Falls, Texas, or any part of such turnpike; provided the northern terminus of said turnpike, or a gate, shall be located on or West of May Avenue and within three (3) miles of the Will Rogers Airport; provided further, the Oklahoma Turnpike Authority and the Oklahoma Department of Highways are hereby authorized to enter into an agreement for the construction by the Department of Highways of a four-lane divided toll-free bridge on a United States or State Highway across the South Canadian River south or west of Will Rogers Airport and west of the north-south line of May Avenue, with one-fourth (1/4) of the cost of said bridge and the approaches thereto to be paid by the Oklahoma Turnpike Authority and the remaining three-fourths (3/4) to be paid from State and Federal-Aid Funds; and in the event said bridge is constructed in this manner then said Turnpike gate or terminus may be south of said bridge and more than three (3) miles from said airport; provided further, that the turnpike shall run within two (2) miles of the city limits of Chickasha.

(3) The Northeastern (Will Rogers) Turnpike.

(4) A turnpike, or any part or parts thereof, beginning at the Oklahoma-Texas State Boundary line, and extending North on a route lying East of the Cities and Towns of Wilson, Maysville, Norman and Oklahoma City, and West of the Eastern State line of Oklahoma to a connection or connections between the Turner Turnpike and the south side of the Arkansas River, then in the direction toward the Texas border in the most feasible and economical route. Provided, further, that the revenue bonds to finance the construction of the Turnpike authorized by

this paragraph shall not be issued until after or simultaneously with the issuance of the revenue bonds to finance the construction of the Turnpike authorized by paragraph (2) of this Section, or firm and properly secured arrangements have been made for the financing of both Turnpikes.

The Agreement or Agreements for financing the Turnpikes authorized by Paragraphs (2) and (4) of this Section may contain a provision that tolls shall continue to be charged on all Turnpikes until the bonds, and the interest thereon, of all Turnpikes have been fully paid off, and provision that the revenues from any of the Turnpikes in excess of its operating and maintenance costs and sinking fund and other reserve requirements shall be used to pay the obligations of the other Turnpikes.

All access roads interchanges, or lead roads connecting such turnpikes with existing highways must be built by funds furnished by the Turnpike Authority.

* * * * * * *

69 O.S. (1959 Supp.), Sec. 659

§ 659. Turnpike revenue bonds

The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of Turnpike revenue bonds of the Authority for the purpose of paying all or any part of the cost of any one or more Turnpike projects, and the Authority may in its discretion where it finds that it would be economical and beneficial to do so, combine two or more, or any part thereof, or all of its proposed projects into one unit and consider the same as one project to the same extent and with like effect as if the same were a single project. The principal of and the interest on said bonds shall be payable solely from the funds herein provided for such payment.

* * * * * * *

69 O.S. (1959 Supp.), Sec. 668

§ 668. Judicial determination of validity of bonds and trust fund

The Oklahoma Turnpike Authority is authorized in its discretion to file an application with the Supreme Court of Oklahoma for the approval of any bonds to be issued hereunder, and exclusive original jurisdiction is hereby conferred upon the Supreme Court to hear and determine each such application. It shall be the duty of the court to give such applications precedence over the other business of the court and to consider and pass upon the applications and any protests which may be filed thereto as speedily as possible. Notice of the hearing on each application shall be given by a notice published in a newspaper of general circulation in the State that on a day named the Authority will ask the court to hear its application and approve the bonds. Such notice shall inform all persons interested that they may file protests against the issuance of the bonds and be present at the hearing and contest the legality thereof. Such notice shall be published one time not less than ten (10) days prior to the date named for the hearing and the hearing may be adjourned from time to time in the discretion of the court. If the court shall be satisfied that the bonds have been properly authorized in accordance with this Act[1] and that when issued they will constitute valid obligations in accordance with their terms, the court shall render its written opinion approving the bonds and shall fix the time within which a petition for rehearing may be filed. The decision of the court shall be a judicial determination of the validity of the bonds, shall be conclusive as to the Authority, its officers and agents, and thereafter the bonds so approved and the revenues pledged to their payment shall be incontestable in any court in the State of Oklahoma.

* * * * * * *

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 11 1961
JAMES R. BROWNING Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 957

BILL HOOVER,
Petitioner,

VERSUS

OKLAHOMA TURNPIKE AUTHORITY,
Respondent.

APPENDIX II TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES R. NISBITT,
1909 First National Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

May, 1961.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8753

INDEX

	PAGE
Exhibit A:	
Syllabus and Opinion of the Court	i-xlviii
Exhibit B:	
Order (February 14, 1961)	xlix-l
Exhibit C:	
Order Denying Motion for Rehearing and Motion to Vacate (March 1, 1961)	li-lii
Exhibit D:	
Application of Oklahoma Turnpike Authority	liii-lvii
Exhibit E:	
Protest, Objection and Contest of Bill Hoover	lviii-lxvii
Exhibit F:	
Application for Reference to a Referee for Taking of Evidence and Testimony Upon Issues of Fact	lxviii-lxix
Exhibit G:	
Order of October 17, 1960, Denying Application	lxx
Exhibit H:	
Motion to Vacate and Set Aside Order Denying Application for Reference; and for Rehearing and Reconsideration Thereof	lxxi-lxxiii
Exhibit I:	
Order (October 31, 1960)	lxxiv-lxxv
Exhibit J:	
Petition for Rehearing	lxxvi-lxxx

APPENDIX

EXHIBIT A

Application of the OKLAHOMA TURNPIKE AUTHORITY for the Approval of the Issuance of Turnpike Revenue Bonds of the Authority for Defraying the Cost of Projects on the Southwestern Turnpike and on the Eastern Turnpike.

No. 39359.

Supreme Court of Oklahoma.

Jan. 26, 1961.

Rehearing Denied Feb. 14, 1961.

Application for Leave to File Second Petition for Rehearing Denied March 1, 1961.

(359 P.2d 680)

Syllabus by the Court.

1. The official actions and proceedings of the Oklahoma Turnpike Authority respecting the authorization and the approval of the location, construction and financing of the Southwestern Turnpike Project and the Eastern Turnpike Project, and the authorization and issuance of the Bonds and the authorization and delivery of the Trust Agreement and the provisions of the Trust Agreement, are valid and in conformity with the Enabling Act and other applicable law.

2. The holders of outstanding bonds issued to construct these two Turnpikes or either of them have an accrued and vested right to an exclusive pledge by the Authority under the Trust Agreement to deposits accumulated in the Trust Fund for making up any deficiency in moneys available to meet interest requirements as pro-

vided in 69 O.S.Supp.1959, Sec. 683, and for the payment of interest on the bonds during the period of construction as specified in the Trust Agreement.

3. While the holders of outstanding bonds issued to build these two Turnpike Projects or either of them have an accrued and vested right to an exclusive pledge by the Authority of deposits which have accumulated in the past or which will accumulate in the future in the segregated Trust Fund pursuant to 69 O.S.Supp.1959, Secs. 680 and 683(a) and (b), they will not have an accrued and vested contract right in and to the continued apportionment to the Authority by the State of Oklahoma each calendar month of 97% of an amount equal to the motor fuel excise taxes collected on motor fuel consumed on all Oklahoma Turnpike Projects according to the provisions and limitations of the Act, and will have no vested contract rights which would preclude the Legislature from repealing, reducing or otherwise changing the levy or rate of levy of such tax.

4. The holders of outstanding bonds of these two Turnpike Projects or either of them have an accrued and vested right to an exclusive pledge under the Trust Agreement of the revenues of the paid-out projects as provided in 69 O.S.Supp.1959, Sec. 667, and to the continued operation of said paid-out projects as toll facilities.

5. The holders of the outstanding bonds of these two Turnpike Projects or either of them have an accrued and vested right in the requirement in the Trust Agreement that investments of Trust Fund moneys by the Authority shall be confined exclusively to obligations or securities of the United States of America or on which the principal and interest are unconditionally guaranteed by the United States of America.

6. There is no illegality in the action of the Oklahoma Highway Department in projecting public highway construction near these two Turnpikes, including bridges ove

the South Canadian River and Red River, and in entering into an agreement with the Oklahoma Turnpike Authority to complete such highway facilities within stated periods after Turnpike Project Bonds are sold, said contract being construed to mean that said facilities will be built and will be completed in the times stated if the Highway Department has on hand funds and capabilities to so construct such facilities at that time.

7. The obligations assumed by the Oklahoma Department of Highways by its agreements with Turnpike Authority to construct certain highway facilities will not result in making the Bonds issued by the Authority public debts or obligations within the meaning of Sections 23 and 25, Article 10 of the Constitution of Oklahoma, notwithstanding the fact that the construction of such highway facilities at State expense may benefit these Turnpike Projects or either of them and the patrons thereof and the holders of bonds thereon.

8. The Turnpike Authority's pledge of deposits in the Trust Fund may be legally confined to secure or give full priority of security to bonds issued to build these two Turnpike Projects or either of them, excluding from the equal benefits thereof bonds issued for future Turnpike Projects that may hereafter be authorized by the Legislature.

9. The provisions of the Trust Agreement combining into one unit and treating as a single project the Southwestern Turnpike Project and the Eastern Turnpike Project are valid and in conformity with applicable law including particularly 69 O.S.Supp.1959, Secs. 659 and 661.

10. Section 212 of the Trust Agreement relating to the issuance of Turnpike Revenue Refunding Bonds is valid and in conformity with applicable law, including particularly the second sentence of 69 O.S. 1951, Section 669.

11. Upon full hearing and due consideration it is determined that legal notice of this application was given,

that the applicant and all protestants were fully heard and their grounds of protest considered, that the court is satisfied that the Oklahoma Turnpike Authority's Revenue Bonds in the sum of $59,000,000 and $31,000,000, total $90,000,000 for construction of Southwestern Turnpike Project and Eastern Turnpike Project have been properly authorized in accordance with the law, 69 O.S.Supp.1959, Secs. 659, 668, and that when issued in accord with applicable laws and with this decision such Bonds will constitute valid obligations in accordance with their terms, and that such Bonds should be and are hereby approved by this Court.

* * * * * * * * *

WELCH, Justice.

The Oklahoma Turnpike Act of 1959, House Bill 932, of the 1959 Legislature, 1959, became effective on the 16th day of July, 1959.

It was provided in the second paragraph of Section 5 of the Act, 69 O.S.Supp § 668, that:

> "Immediately upon the passage and approval of this Act, the Oklahoma Turnpike Authority shall file an application with the Supreme Court, under the procedure set out above, for a determination of the validity of such Trust Fund and the earmarking of revenues thereto, the validity of a pledge thereof by the Authority as provided in this Act, and any other questions as to the constitutionality or validity of this Act that may be brought before the Supreme Court, and exclusive, original jurisdiction is hereby conferred upon the Supreme Court to hear and determine such application. * * *"

The "Procedure set out above" relates to the giving and publishing of notice, advising of the unrestricted right of protest, fixing the time allowed therefor and naming the

hearing date. This detail was set out in the first paragraph of section 5 and need not be copied herein.

[1] The Legislature had authority to confer this additional jurisdiction on the Supreme Court by reason of the provisions of the Constitution of Oklahoma, Article 7, Section 2, which generally states the original jurisdiction of the Supreme Court and provides that the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law.

Pursuant to the above quoted provision, the applicant, Authority, filed such an application for the determinations stated. Due notice was given. Protest was filed by Perry J. Baker and hearing was had at which both Authority and protestant appeared and participated by counsel.

After final hearing this court decided the cause—348 P.2d 510.

In that case we held that the applicable Act, House Bill 932, of the 1959 Legislature, 1959 S.L. pp. 285-292, 69 O.S.1959, Supp. §§ 689-683, was in keeping with the Constitution of Oklahoma, and was not unconstitutional as to any of the points presented in that case, and we decided and answered nine specific questions there presented, all as shown by the cited decision.

Following that decision the Oklahoma Turnpike Authority, hereinafter referred to as "Authority" made provision by proper resolution for two bond issues of Turnpike Revenue Bonds for the construction of two toll turnpikes in Oklahoma; one bond issue for the Southwestern Turnpike Project in the sum of $59,000,000, and one bond issue for the Eastern Turnpike Project in the sum of $31,000,000. The purpose of these bond issues was to obtain funds to construct the Southwestern Turnpike Project from near Oklahoma City towards Wichita Falls, Texas, and to

construct a specified portion of the Eastern Turnpike Project between a point near Tulsa and the Oklahoma-Texas Boundary Line.

This application seeks the approval of these bond issues and the answering of certain questions propounded or presented. The application was filed as an original action in this court pursuant to the provisions of the Act which authorizes the Authority to so proceed. By the Act exclusive original jurisdiction is conferred upon this court to hear and determine such application and the duty of the Court to determine such an action is set out in the Act.

As provided and required by the Act due notice of hearing on this application was given, stating the date the Authority would ask the Court to hear its application and to approve the Bonds. Such notice informed all persons interested that they might file protest against the issuance of the Bonds and be present and be heard and contest the legality thereof.

On timely appearances, protests were filed by Bill Hoover represented by Attorneys, Charles Nesbitt, James C. Hamill and Mack Braly; and by Avard Hudson, William R. Wilson, O. P. Phillips, Norman Nickell, Roy T. Oliver, Bill Boyce, Dwight Peck, M. B. Hamby, Harold McKinnon, John Morgan, M. J. Hughey, John M. Rasberry, O. O. Wilcox, M. A. Spitler, Boyce D. Blackburn and Jack W. Herring, represented by attorneys Hugh M. Sandlin and J. C. Daugherty; thereupon the court, as required by the Act, gave such application precedence over the other business of the court and fully heard the applicant and all protestants upon written briefs and oral presentation, and upon request to consider the specific questions propounded, with documentary showing of the various meetings and actions of the Turnpike Authority and of the State Highway Department, considering the form of the Bonds a...

Trust Agreement incident thereto, and other documents involved.

By the law of course the bonds could not create any debt against the State, and that is shown on the face of the bonds as the law requires.

This 1959 Act generally followed Turnpike Legislation which has been passed upon and construed by this court in several cases: Application of the Oklahoma Turnpike Authority for the Approval of Bonds, 1950, 203 Okl. 335, 221 P.2d 795; Application of Oklahoma Turnpike Authority for Approval of Bonds, 1952, 206 Okl. 617, 246 P.2d 327, and Application of Oklahoma Turnpike Authority for Approval of Bonds, Okl.1954, 277 P.2d 176.

Many of the questions which might ordinarily arise as to the construction and maintenance and financing of turnpike construction have been answered in these former decisions, and under those decisions turnpikes have been constructed and in operation for a number of years. However, this 1959 Act contains some other provisions as to financing, construction and operation of turnpikes. While this 1959 Act is based upon the same general plan and purpose to finance and build additional turnpikes, the new or additional details of plan present specific questions to be here determined.

Upon the application of Authority, and the contentions of protestants, the several questions here presented for consideration and determination are numbered and treated consecutively for convenience and to meet the method of presentation.

For ease of reference the terms "Enabling Act", "Southwestern Turnpike Project", "Eastern Turnpike Project", "Southwestern Route", "Eastern Route", "Bonds", "Turnpike Revenue Bonds", "Sinking Fund", "Trust Fund" and "Trust Agreement" in this opinion are intended to

have the same meaning as the same terms, respectively, have in the Application, briefs and Trust Agreement of the Authority.

The First Question posed by applicant is whether the official actions and proceedings of the Authority respecting the authorization and the approval of the location, construction and financing of the specified Southwestern Turnpike Project and the specified Eastern Turnpike Project, and the authorization and issuance of the Bonds and the authorization and delivery of the Trust Agreement, and the provisions of the Trust Agreement, are valid and in conformity with the Enabling Act and other applicable law.

The Authority is fully authorized to construct the Southwestern Turnpike Project and the Eastern Turnpike Project. Section 651 of the Enabling Act provides as follows:

> "In order to facilitate vehicular traffic throughout the State and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known safety device including center divisions, ample shoulder widths, longsight distances, the by-passing of cities and towns, multiple lanes in each direction, and grade separations at all intersections with other highways and railroads, the Oklahoma Turnpike Authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair, and operate turnpike projects (as hereinafter defined) at such locations as shall be approved by the State Highway Commission, and to issue turnpike revenue bonds of the Authority payable solely from revenues, to pay the cost of such projects."

Section 655(e) of the Enabling Act provides as follows, vesting power:

"To construct, maintain, repair and operate turnpike projects and highways, with their access and connecting roads, at such locations and on such routes as it shall determine to be feasible and economically sound; provided that until specifically authorized by the Legislature, the Authority shall be authorized to construct and operate toll turnpikes only at the following locations: * * *

"(2) That part in Oklahoma of a turnpike between a connection with the Turner Turnpike near the Oklahoma City Terminus and Wichita Falls, Texas, or any part of such turnpike; provided the northern terminus of said turnpike, or a gate, shall be located on or West of May Avenue and within three (3) miles of the Will Rodgers Airport; provided further, the Oklahoma Turnpike Authority and the Oklahoma Department of Highways are hereby authorized to enter into an agreement for the construction by the Department of Highways of a four-lane, divided, toll-free bridge on a United States or State Highway across the South Canadian River South or West of Will Rodgers Airport and west of the north-south line of May Avenue, with one-fourth (1/4) of the cost of said bridge and the approaches thereto to be paid by the Oklahoma Turnpike Authority and the remaining three-fourths (3/4) to be paid from State and Federal-Aid Funds; and in the event said bridge is constructed in this manner then said Turnpike gate or terminus may be south of said bridge and more than three (3) miles from said airport; provided further, that the turnpike shall run within two (2) miles of the city limits of Chickasha.

* * * * * * *

"(4) A turnpike, or any part or parts thereof, beginning at the Oklahoma-Texas State Boundary Line,

and extending North on a route lying East of the Cities and Towns of Wilson, Maysville, Norman and Oklahoma City, and West of the Eastern State line of Oklahoma to a connection or connections between the Turner Turnpike and the south side of the Arkansas River, then in the direction toward the Texas border in the most feasible and economical route. Provided, further, that the revenue bonds to finance the construction of the Turnpike authorized by this paragraph shall not be issued until after or simultaneously with the issuance of the revenue bonds to finance construction of the Turnpike authorized by paragraph (2) of this Section, or firm and properly secured arrangements have been made for the financing of both Turnpikes."

The Southwestern Turnpike Project consists of two parts of the turnpike specifically authorized pursuant to clause (2) quoted above and the Eastern Turnpike Project is a part of the turnpike specifically authorized under clause (4) quoted above. The Enabling Act expressly authorizes the construction of "any part" of the Southwestern Route and "any part" of the Eastern Route.

Section 659 provides, in part, as follows:

"The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of Turnpike revenue bonds of the Authority for the purpose of paying all or any part of the cost of any one or more Turnpike projects, and the Authority may, in its discretion where it finds that it would be economical and beneficial to do so, combine two or more, or any part thereof, or all of its proposed projects into one unit and consider the same as one project to the same extent and with like effect as if the same were a single project. The principal of and the interest on said bonds shall be payable *soley* from the funds

herein provided for such payment. The bonds of each issue shall be dated, shall bear interest at such rate or rates not exceeding five per centum (5%) per annum, shall mature at such time or times not exceeding forty (40) years from their date or dates, as may be determined by the Authority, and may be made redeemable before maturity, at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the State. The Bonds shall be signed by the Chairman of the Authority, and the official seal of the Authority shall be affixed thereto and attested by the Secretary and Treasurer of the Authority, and any coupons attached thereto shall bear the facsimile signature of the Chairman of the Authority. In case any officer whose signature or facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. All bonds issued under the provisions of this Act shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the State. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provisions may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered

as to both principal and interest. The Authority may sell such bonds in such amounts and in such manner, either at public or private sale, and for such price as it may determine to be for the best interest of the State, but no such sale shall be made at a price so low as to require the payment of interest on the money received therefor at more than five (5%) per centum per annum computed with relation to the absolute maturity of the bonds in accordance with the standard tables of bond values, excluding, however, from such computation the amount of any premium to be paid on the redemption of any bonds prior to maturity."

[2] The actions and proceedings of the Authority are adequately shown by minutes of meetings, and by documents executed or approved by Authority. All this showing is ample to direct an affirmative answer to this first question.

The protestants contend that the Authority was not justified in finding that the Eastern Turnpike Project alone was "feasible and economically sound," or in finding that the Southwestern and Eastern Turnpike Projects as a unit were "feasible and economically sound."

[3] It is true the law above quoted contemplates that turnpikes or portions thereof should be constructed only where Authority deemed feasible and economically sound, but determination thereof is exclusive in the discretion of Authority.

It is conceivable that an error might occur either way. The Authority might by timid caution too long forego such a construction, though specifically within legislative contemplation, on the erroneous thought it was not feasible. Or the Authority might conclude such a construction to be feasible, which would require more time after construc-

tion than expected to fully demonstrate feasibility and economic soundness.

This merely demonstrates that the Authority, like other agencies or entities, is not infallible, but it points to the true rule to guide the present consideration. That is that the Authority should observe the best tests, checks, studies and reports available or obtainable in a persistent effort to thoroughly test feasibility and economic soundness, and then apply its official discretion.

Then it is for the Authority to say whether it is satisfied that the proposal is feasible and economically sound.

It appears to us from the record that the Authority so proceeded in this instance, and we cannot say at all that its conclusion was not justified.

We answer this first question in the affirmative.

[4] The Second Question is whether the holders of the Bonds have so long as any of the Bonds are outstanding, an accrued or vested contract right in and to an exclusive pledge by the Authority under the Trust Agreement of deposits accumulated in the Trust Fund for making up any deficiency in the moneys available to meet interest requirements on the bonds issued under the provisions of the Trust Agreement, as provided in Section 683 of the Enabling Act, and for the payment of interest on the Bonds as it becomes due and payable during the period of construction as specified in Section 404 of the Trust Agreement.

[5] The protestant herein apparently takes the position that to allow the Bondholders to have a vested contract right to the deposits accumulated in the Trust Fund creates a debt or obligation against the State in violation of Article 10, Section 23 of the Oklahoma Constitution. However, we cannot agree with this contention.

Under the Act it is not the credit of the State that is to be considered in the pledge, it is the deposits that accumulate in the Trust Fund as they accumulate, nor is it any particular portion of the gasoline tax that is being pledged under the Act, since the pledge does not attach to any part of the gasoline tax until it is collected and its proceeds deposited in the Fund, and under said Act, then only that portion of the gasoline tax computed to have been paid on gasoline used in traveling upon the turnpikes is deposited in the Trust Fund. Therefore this pledge is limited to the funds actually accumulated by apportionment of motor fuel tax. These funds may be large or small, based upon the use of the Turnpikes by the public. For example, should the public cease to use the turnpikes for any reason, then under the Act no portion of our gasoline tax would be subject to the pledge, nor would the pledge constitute a debt against the State.

Section 683(b) clearly provides that the deposits in the Trust Fund, as the same accumulate, may be expended or pledged by the Authority as it may deem proper. We construe this to mean that the Authority may pledge said deposits which have accumulated in the past or which will accumulate in the future, without in any way creating a debt against the State. Accordingly, the granting under the Trust Agreement of an exclusive pledge securing all the Bonds that may be issued to complete the turnpikes presently authorized under the Enabling Act is both reasonable and consistent with the law and decisions in the several Turnpike cases heretofore decided.

Turnpikes have been held to be public highways. Application of Oklahoma Turnpike Authority, 203 Okl. 335, 221 P.2d 795. The above use of the stated portion of motor fuel tax funds is therefore used for public highway construction and in fact is a use for public highway purpose.

Therefore, for the reasons stated, and under the terms and provisions of the Act before us, we answer this second question in the affirmative.

The Third Question is whether the holders of the Bonds have, so long as any of the Bonds are outstanding, an accrued or vested contract right in and to the continued apportionment to the Authority by the State of Oklahoma each calendar month of 97% of an amount equal to the motor fuel excise taxes computed on 97½% of the total gallonage of all fuels consumed during the calendar month in which the tax being apportioned accrued on all Oklahoma Turnpike projects, and the continued deposit in the Trust Fund established pursuant to the Enabling Act of the full amount of each such apportionment until the balance in the Trust Fund reaches the statutory maximum, all in the manner and to the extent provided in the Enabling Act; provided, however, that no right shall thereby be vested precluding the Legislature of the State of Oklahoma from repealing, nullifying, reducing, maintaining at its present rate or otherwise changing the levy or the rate of levy of such motor fuel taxes.

In former Turnpike legislation all money collected as tolls for travel upon the Turnpike was placed in a General Turnpike Trust Fund to be used to pay for construction and maintenance of the Turnpike. This 1959 Act would create a separate segregated Trust Fund to be created by and contributed to by allocation of a stated portion of the motor fuel tax collected on motor fuel consumed on all Oklahoma Turnpike Projects, with limitation on the aggregate amount of such allocations, and with provisions for the contingent use of this fund by Authority, and with provisions for repayment to this fund of any money so withdrawn therefrom by Authority.

We construe the intent of the Legislature, in its enacting the 1959 Amendment to the Enabling Act with refer-

ence to the apportionment of motor fuel taxes and the establishment of the additional Trust Fund, to be for the purpose of facilitating the construction of the Turnpikes authorized under Section 655(e) (2) and (4) of said Act. In order to finance such construction, and thereby carry out the statutory objective it apparently seemed to be necessary or desirable to provide for the continued apportionment of the stated portion of collected motor fuel taxes to the Authority for this segregated Trust Fund so long as any of the Bonds are outstanding in accordance with Sections 680 to 683. It is obvious that the Legislature intended this to be done and it is so provided in sub-section Section 680, as follows:

> "(a) Beginning with the first apportionment of motor fuel taxes made after the passage and approval of this Act, and until all turnpike revenue bonds hereafter issued by the Oklahoma Turnpike Authority and the interest thereon shall have been paid, or a sufficient amount for the payment of all such bonds and the interest thereon shall have been set aside in trust for such purpose, the Oklahoma Tax Commission shall each month determine an amount equal to the motor fuel excise taxes computed on ninety-seven and one-half per cent (97½%) of the total gallonage of all fuels consumed, during the calendar month in which the tax being apportioned accrued, on all Oklahoma Turnpike Projects and apportion a sum equal to said amount from all gasoline tax collections as follows:
>
> "Ninety-seven per cent (97%) of such amount to the Oklahoma Turnpike Authority and three per cent (3%) to the Oklahoma Tax Commission Fund, after which apportionment all other apportionments of motor fuel excise taxes shall be made according to existing or subsequently enacted apportionment laws. Provided that apportionments herein required to be made

to the Oklahoma Turnpike Authority shall not in any fiscal year exceed One Million Dollars ($1,000,000.00)

* * *

"(b) If at the time of each monthly apportionment required herein there shall be a balance in the Trust Fund created by this Act equal to three (3) years annual interest on all Turnpike bonds on all turnpikes hereafter financed, or prior to the issuance of any such bonds there shall be a balance in the Trust Fund created by this Act in excess of Four Million Dollars ($4,000,000.00), the Oklahoma Tax Commission shall in said month make no apportionment to the Oklahoma Turnpike Authority of motor fuel taxes but shall apportion the same according to previously existing or subsequently enacted apportionment laws."

Section 683 provides in part as follows:

"(a) The Oklahoma Turnpike Authority shall segregate and hold such motor fuel excise taxes apportioned to it by this Act in trust for the uses and purposes herein provided.

"(b) The deposits in this Trust Fund, as the same accumulate, may be expended or pledged by the Oklahoma Turnpike Authority, as it may deem proper, either in whole or in part, for making up any deficiency in the moneys available to meet interest requirements on Turnpike Bonds hereafter issued and for the payment of necessary expenses in the financing of additional Turnpikes, provided, that such expenses of financing shall not exceed on the Southwest Turnpike the sum of Twenty-five Thousand Dollars ($25,000.00) or on the Eastern Turnpike the sum of Fifty Thousand Dollars ($50,000.00), not more than ten per cent (10%) of which sums shall be used as attorneys' fees, and provided, that any funds expended as permitted herein

shall, upon payment of all interest and principal of all bonds issued hereunder, and before delivery of any said Turnpike to the State of Oklahoma Department of Highways, be replaced in said trust fund by said authority, and upon the completion of said reimbursement, said trust shall terminate and the balance in said trust fund shall be delivered to the State of Oklahoma Department of Highways."

We specifically held this Act to be valid and to involve no violation of the Constitution in Application of Oklahoma Turnpike Authority, Okl.1960, 348 P.2d 510.

Thus by present laws the motor fuel tax is established and definite and so is the apportionment of the proceeds thereof, including the apportionment of this portion to Authority, and under existing laws it is contemplated that there will continue to be a motor fuel tax with apportionment of the proceeds or collections thereof as now provided.

However, there is nothing in the law 69 O.S.Supp.1959 § 683(a) and (b) to guarantee that the future Legislatures must maintain the same motor fuel tax or the same apportionment of the proceeds or of the collections thereof.

[6] It therefore becomes apparent that the Turnpike Authority is inviting this court to make guarantees that are not made by the legislation under consideration. Having concluded that the Legislature has not given the bondholders a vested right in, or a guarantee, that future Legislatures must maintain the same motor fuel tax or the same apportionment of the proceeds it follows that we must, and do, hold that the bondholders will not have an accrued or vested contract right in and to the maintenance of the same motor fuel tax or the same apportionment thereof. We further hold, however that the bondholders will have a vested

right to any funds that have been in the past or are in the future deposited or accumulated in the Trust Fund from this source.

The Fourth Question is whether the holders of the Bonds have, so long as any of the Bonds are outstanding, an accrued or vested contract right in and to an exclusive pledge under the Trust Agreement of the revenues of the "paid-out projects" as provided in Section 667 of the Enabling Act and the continued operation of said "paid-out projects" as toll facilities under said Section.

Section 7 of the 1959 Act, 69 O.S.Supp. § 655, subdivision (e) in paragraph numbered (2) for the construction of the "Southwestern Turnpike" and the bridge across South Canadian River, and in paragraph numbered (4) for the construction of the "Eastern Turnpike." The next paragraph of the Act provides as follows:

> "The Agreement or Agreements for financing the Turnpikes authorized by Paragraphs (2) and (4) of this Section may contain a provision that tolls shall continue to be charged on all Turnpikes until the bonds, and the interest thereon, of all Turnpikes have been fully paid off, and provision that the revenues from any of the Turnpikes in excess of its operating and maintenance costs and sinking fund and other reserve requirements shall be used to pay the obligations of the other Turnpikes."

This combining of sources of revenue from all turnpikes to pay for all turnpikes is similar in principle as was done when the revenue from all State Park facilities was combined to pay for all State Park facilities and improvements, which was by this court approved in Application of Oklahoma Planning and Resources Board case, Okl., 274 P.2d 61.

All Turnpikes authorized are to be used for public highway purposes therefore all tolls collected are being used for this purpose.

This plan appears to the court as being beneficial to the State by hastening the time when all Turnpikes may be eventually paid for and turned over to the State Highway Department. This will leave more funds available for use on other public highways, while those using any of the Turnpike System will bear the financial burden of maintaining and paying for the entire System. Furthermore, it is a means by which an improved highway system may be accomplished without using revenue obtained from those who are non-users of the Turnpikes.

[7] The authorization granted the Authority by the Legislature under Section 655, subsection (4) or paragraph (e) to continue charging tolls on all Turnpikes until bonds and interest on all Turnpikes were fully paid off, and the revenues therefrom in excess of operating and maintenance costs, sinking fund and other reserve requirements, to be used to pay the obligations of other Turnpikes, is a legal authorization. Such authorization to pledge revenue received from the use of a state owned facility has been upheld by this court in Application of Oklahoma Planning and Resources Board, supra.

The last above quoted statutory provision was specifically upheld in determining the sixth question in our former decision in Application of Oklahoma Turnpike Authority, Okl., 348 P.2d 510. See also the Kentucky Turnpike case [Turnpike Authority of Ky. v. Wall], Ky., 336 S.W.2d 551.

[8] Therefore for the reasons stated, and under the terms and provisions of the Act before us, we answer this fourth question in the affirmative.

[9] The Fifth Question posed by applicant is whether the holders of the Bonds have, so long as any of the Bonds

are outstanding, an accrued or vested contract right in and to the requirement in the Trust Agreement that investments of moneys in the Trust Fund shall be confined exclusively to obligations or securities of the United States of America or obligations or securities the principal of and interest on which are unconditionally guaranteed by the United States of America.

Section 602, as revised, of the Trust Agreement with reference to the investment of moneys deposited in the Trust Fund provides:

> "An amount of the moneys held for the credit of the Turnpike Trust Fund equal to twelve (12) months' interest on all bonds then outstanding (or all such moneys if the amount then held for the credit of said Fund shall be less than such twelve (12) months' interest) shall at all times, as nearly as may be practicable, prior to the second interest payment date after the construction of the Southwestern Turnpike Project shall be completed, be invested and reinvested by the Authority in Government Obligations which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than the interest payment date next succeeding, and after such second interest payment date following the completion of such construction, be invested and reinvested by the Authority in Government Obligations which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than three (3) years after the date of such investment."

It is provided in Section 101 of the Trust Agreement that the term "Government Obligations" means direct obligations of the United States Government or obligations guaranteed by the Government, as to both principal and interest.

Legal permission to make such investments is found in Statute 69 O.S.Supp. § 683(d) which provides:

> "The Oklahoma Turnpike Authority is hereby authorized to invest all or any part of such Trust Fund in securities of the United States of America."

This statute and recognized good business practice would seem to fully authorize the inclusion of above quoted Section 101 of the Trust Agreement. When it is so included and bonds are sold on that basis, among others, it would follow that bond buyers would have the right to rely thereon.

Reiterating in part appropriate language in Application of Oklahoma Turnpike Authority, Okl.1960, 348 P.2d 510, we here say as to Section 101 above quoted we think it is the universal practice to authorize various public agencies as well as others to make investments in securities of the United States of America. This means of course in their discretion as to when and how much money may be so invested so as not to restrict the availability of such funds when they are needed by the Authority for proper expenditure purposes.

We do not observe that either of the protestants has specifically questioned the here involved section of the Trust Agreement or has challenged an affirmative answer to this question. We do not observe any basis of which the point would be vulnerable to such an attack or open to question.

We answer this fifth question in the affirmative.

In Proposition Six we are required to consider the legality and validity of two certain agreements of the Oklahoma Department of Highways. The affirmative of such legality is here presented by applicant while the negative thereof is urged by protestants.

The two written agreements are a part of the application. One as Exhibit E. provides for construction by Department within the time therein specified after sale of Turnpike Bonds of certain specified highway facilities on or near the general southwestern route which with the Southwestern Turnpike Project will merge or meld into a symmetrical whole an important and extensive artery of traffic in the State.

The other agreement Exhibit G. provides for specified construction of the general eastern route which so far as the legal questions involved may be said to be similar construction of highway facilities.

These facilities will be used by Turnpike patrons, but will also be freely used by other motorists not Turnpike patrons.

These facilities, like all public highways in the State, will permit and assist any one to approach near to these toll Turnpikes so as to enter upon and into the access roads, entrances and gates of Turnpike. These facilities will, with all other public highways of the State, permit and aid travelers who have used the Turnpike and passed through the gates and exits and left Turnpike premises, to travel on to any destination dictated by their needs or desires. They are not of course a part of the Turnpike, and are to be constructed by Department from public highway funds as other general public highway facilities.

These facilities will play their part in co-ordinating the entire highway system of the State with the Turnpikes, each in a way aiding or adding to the use of the other. For that matter before we had Turnpikes nearly every highway aided or added to the use of many of nearly all other highways though not a part thereof. Nearly all city streets give some aid or addition to travel on many or nearly all other streets.

Based apparently, or in part, upon the fact that these facilities will substantially aid Turnpike travelers the protestant contends that these facilities will constitute lead roads or access roads to the Turnpikes here involved, and that they should be constructed and paid for by the Turnpike Authority, and therefore that it is illegal for the Highway Department to project such construction and to complete such construction out of the public highway funds.

The law provides, 69, O.S.Supp. § 655(e) (4) as follows:

> "All access roads interchanges, or lead roads connecting such turnpikes with existing highways must be built by funds furnished by the Turnpike Authority."

So the question occurs whether these highway facilities are to be included in the term of "access roads or lead roads" so connecting with such Turnpike.

The nature and location of these facilities are shown by the drawings thereof and by the minutes, actions, resolutions and agreements of the Highway Commission. They are in the vicinity of the Turnpikes. They connect directly with the general highway system of the State. They are so constructed that Turnpike patrons may pass over these facilities in going to or departing from the Turnpike. But it is clearly shown that such facilities are also usable by travelers between various points in the State who do not enter the Turnpike premises at all. It is from those facilities, as from many other State Highways, that persons enter upon the Turnpike premises by driving on to the Turnpike lead or access roads and thence to and from the entrances and gates of the Turnpike.

[10] We construe the terms access roads and lead roads forming turnpike connections to mean those travelways which are essential to completion of the turnpike it-

self, and which are to be maintained and controlled by the Turnpike Authority. The law provides, 69 O.S.Supp. § 655 (in part):

> "The Authority is hereby authorized and empowered * * * [e] to construct, maintain, repair and operate turnpike projects and highways, with their access and connecting roads, * * *."

[11] The facilities here involved are free to public use. They are not in any manner to be controlled or operated by the Turnpike Authority. If they are not truly such public roads, separate from the Turnpikes, then it would necessarily follow that they would be controlled and operated by the Turnpike Authority, and therefore be a part of the Turnpike itself.

As supporting our conclusion here we observe that, specifically by law, the Federal Government will not contribute to the construction of any part of a toll Turnpike or facility thereof (23 U.S.C.A. § 301), but each highway facility here proposed to be constructed by the Highway Department is such construction as will have participation by the Federal Government and of federal funds with federal approval of the project as a proper and useful highway facility, separate from the Turnpike Project.

In those actions by the Highway Department we observe nothing more than wholesome plans and purposes, within full legal authority, to cooperate in the planning and projecting of proper steps looking towards building an overall substantial and complete highway system for the State.

It has been the policy of the State for fifty years, and it has continuously acted, step by step, to build such a comprehensive highway system. As always, it is the continuing province of the Highway Department in its discretion to build each year the type and location of highway facilities which it should build and which it can build with avail-

able state and federal funds. The fine results achieved stand as a testimonial to the diligence, and capable exercise of discretion, of those having to do with the planning and financing and construction of our numerous highway projects. It is quite apparent that the proposed facilities here involved will form a valuable addition to our already extensive highway system.

When the officials of the Highway Department in their discretion determine to project these facilities, as they have done here, we see no illegality in their promising or agreeing with the Turnpike Authority that they would construct these facilities.

We already have in operation in Oklahoma two toll Turnpikes, The Turner Turnpike between Oklahoma City and Tulsa, and the Will Rogers Turnpike between Tulsa and Joplin, Missouri, or to the Missouri line. Many state highways reach the vicinity of these turnpikes and the entrances and access roads and gates thereof. Nearly all highways in Central and Northeast Oklahoma directly aid patrons of these two Turnpikes, going to or from them yet all such highways are maintained and operated by the Highway Department separate from the Turnpikes or any control of the Turnpike Authority. To sustain protestant's contention here would be to hold or imply that much of such highway construction would constitute access or lead roads to those two existing toll Turnpikes.

We are convinced that the Legislature intended to provide and did provide only that the Turnpikes and those entrances, access roads and lead roads used exclusively by Turnpike patrons should be the facilities to be constructed exclusively by the Turnpike Authority.

Then the Highway Department in the future, as in the past could exercise its discretion in projecting and constructing general public highway facilities for the best

needs of the general traveling public, whether Turnpike patrons or non Turnpike travelers.

To us the agreement of the Highway Department means that in their discretion they have determined to build these stated facilities and they have planned that they can and will build them in the time stated.

This does not mean that the Highway Department must overlook or cast aside every other need or emergency that might arise as to other highways or bridges in order to complete those projects within the times stated. It means that they will do so in that time if funds are available therefor and to the extent that they can properly expend funds on those projects. We have no doubt that good and proper motives prompted the projecting of these highway facilities, and that proper diligence and discretion will guide to the building of these projects as to the time element as well as to proper construction. The actions of the Highway Department and these agreements are within the discretion and power of the Highway Department and are legal and valid, to be performed of course within any limitation as to available funds or other legal provisions which might enter into the time when the Highway Department should take either or any of the steps toward the completion of these highway facilities.

We answer this sixth question in the affirmative.

[12]. The Seventh Proposition presents the question whether the obligations assumed under said agreements by the Oklahoma Department of Highways to construct, and the construction by the Oklahoma Department of Highways, of the highway facilities referred to in said agreements in the vicinity of the Turnpike on the Southwestern Route and the Eastern Route and the bridges, with approaches thereto, over the South Canadian River, and the Red River and the expenditure therefor of highways funds of the State of Oklahoma will result in making the Bonds

issued by the Authority debts or obligations within the meaning of Sections 23 and 25 of Article X of the Constitution of Oklahoma, notwithstanding the fact that the construction of such highway facilities and the expenditure of such State Departments may benefit the Southwestern Turnpike Project and the Eastern Turnpike Project and patrons thereof and the holders of the Bonds.

While it is conceded that the construction of highway facilities referred to in the two Highway Department contracts will result in benefit to the two Turnpikes here involved, the contracts and said facilities do not involve any Highway Department obligations for direct aid to or construction of any part of the Authority's Projects. All Projects of the Turnpike Authority will be financed solely with the proceeds of the Bonds when and if they are issued and sold by the Authority.

Reference is made to the fact that the construction of these highway facilities will utimately redound to the benefit of the purchasers of Turnpike Authority Bonds, but such benefits would be the same whether the Department of Highways constructs these or similar highway facilities under the terms of the Agreements in question or in the absence of or outside the purview of such agreements.

In applicant's brief it is stated that, as has been indicated above, the contractual obligation of the Department of Highways to construct the highway facilities covered by such agreements is conditioned upon its having legally available adequate funds for such purpose.

We have already so construed the agreements in former statements in this opinion.

It surely could not be contended, and so far as we observe from the briefs and oral arguments it is not contended, that these Agreements impound or bind or in any manner affect any State Highway construction funds now

on hand, or any specific funds which may come into being at any specific time in the future. The time is uncertain when the Highway Department would or should commence construction of any of these facilities involved in these agreements. When that time does come, if it comes, then, the Highway Department would and should commence such construction if it had on hand "legal available adequate funds for such purpose." Likewise the work on such facilities should proceed in due course within the financial and/or other legal limitations, or within the official discretion of the Highway Department in the discharge of its overall duties in the construction and operation of the Highway System of the State.

It is stated in applicant's brief as follows:

> "The obligation of the Department of Highways under said agreements is to construct the highway facilities within the time stipulated but only to the extent that funds therefor are available. No obligation is imposed thereunder to procure funds in the future to carry out the highway work."

It could not be successfully contended that if the Department of Highways is prevented by reason beyond its control from completing these highway facilities within the time stipulated that the Department or the State would be subject to suit for damages or be amenable to other legal action as might be true between individual contracting parties.

It is true, as further stated in applicant's brief that the contractual obligation of said Department under said agreements is merely to build public highway facilities that are not part of any Turnpike Project of the Authority with legally available appropriated funds.

No more can be said of these Agreements than that the obligation assumed by the Highway Department is to

use all proper legal available means to effect completion of the projects within the time indicated. There is the implication in the resolutions and agreements of the Highway Department that in its present best judgment there will be funds and capabilities available to complete the projects within the specified times. Of course the Highway Department has and will have authority to make binding contracts as to the construction of these highway facilities as affects or binds money on hand legally available for such purposes, as of the time of the making of any such contracts. However, the contracts here involved do not constitute a completed specific contractual obligation so as to create any debt within the meaning of Sections 23 and 25 of Article X of the Constitution of Oklahoma.

We therefore answer this seventh question by our conclusion that by these agreements no debt is created contrary to law or contrary to the sections of the Constitution referred to, nor do these agreements result in making these Turnpike Revenue Bonds debts or obligations prohibited by the Constitution. The agreements therefore must be considered, at most, as a moral obligation and not a legal obligation to carry out the terms thereof

[13] The Eighth Proposition presents the question whether the Authority's pledge of deposits in the Trust Fund may be lawfully confined to secure Bonds issued under the terms of the Trust Agreement, excluding from the benefits thereof bonds subsequently issued for other turnpike projects that may hereafter be authorized by the Legislature.

This question was discussed and perhaps decided in connection with applicant's second proposition above.

This Trust Agreement sets up this pledge as an exclusive pledge which would preclude the use of this money, accumulated in the Trust Fund within the stated limits as

a pledge or security for subsequent revenue bonds which might be issued in the future, that is after the bond issues here involved, for Turnpike Projects which might be authorized by the Legislature at some future time.

Of course this pledge is of substantial value to the purchasers of bonds on these two Turnpike Projects. That value would be greatly diminished if subsequently other bond issues without any limitation in amount could be also granted the benefit or equal benefit of this same pledge. Whatever pledge is made covering principal or interest of the bonds here involved the purchasers of these bonds are entitled to rely thereon, and the same money so pledged cannot be otherwise used as a pledge until purchasers of these bonds are paid and satisfied.

If the Legislature and Turnpike Authority engage in building other and additional turnpikes, they might make some secondary pledge of this same money, or might pledge money in desired sums above the present requirements and limitations, but as to the pledge for these bond issues here involved it will be necessary that full priority be preserved.

We do not observe any specific contest of this point by contestants nor do we observe that the point would be vulnerable to attack.

We answer the eighth question in the affirmative.

[14] The Ninth Proposition presents the question whether the provisions of the Trust Agreement combining, for financing purposes, into one unit and treating as a single project the Southwestern Turnpike Project, the Eastern Turnpike Project, and any other project or projects on the Eastern Route for which bonds are issued under the Trust Agreement and establishing a single Sinking Fund for all such bonds, are valid and in conformity with applicable law, including particularly Section 659 of the Enabling Act authorizing the combining of two or more projects and

Section 661 of the Enabling Act preventing the use of Sinking Fund moneys for the payment, purchase, or redemption of any bonds that have not been issued to construct the project from which such moneys were derived.

Section 659 of the Enabling Act reads as follows:

> "The Authority is hereby authorized to provide by resoultion, at one time or from time to time, for the issuance of Turnpike revenue bonds of the Authority for the purpose of paying all or any part of the cost of any one or more Turnpike projects, and the Authority may in its discretion where it finds that it would be economical and beneficial to do so, combine two or more, or any part thereof, or all of its proposed projects into one unit and consider the same as one project to the same extent and with like effect as if the same were a single project. The principal of and the interest on said bonds shall be payable solely from the funds herein provided for such payment."

In conformity with the above-quoted statutory provision, the Authority in the Trust Agreement has provided for combining the turnpike projects financed under the Trust Agreement. The Southwestern Turnpike Project, the Eastern Turnpike Project and any other project or projects on the Eastern Route financed under the Trust Agreement are combined and are collectively called the "Southern Turnpikes." The form of bond at pages 11 and 12 of the Trust Agreement includes the following references to the combined project:

> "The Agreement, in accordance with and as required by the Enabling Act, provides for the fixing, revising, charging and collecting by the Authority of tolls for the use of the Southern Turnpikes and the different parts or sections thereof and for revising such tolls from time to time in order that such tolls and other revenues will be sufficient to provide funds to pay the

cost of maintaining, repairing and operating the Southern Turnpikes and to pay the principal of and the interest on all bonds issued under the Agreement as the same shall become due and payable, and to create reserves for such purposes. The Agreement also provides for the deposit of all such tolls and other revenues, over and above such cost of maintenance, repair and operation and reserves for such purposes, to the credit of a special fund, designated "Oklahoma Southern Turnpikes Interest and Sinking Fund" (herein called the 'Sinking Fund'), which fund is pledged to and charged with the payment of the principal of and the interest on all bonds issued under the Agreement."

Under Article V of the Trust Agreement, the Authority covenants to fix and place into effect a schedule of tolls sufficient to meet current expenses and maintenance and to provide for the required deposits to the credit of the Sinking Fund. Under Section 503 therein a special fund is created designated "Oklahoma Southern Turnpikes Revenue Fund" in which tolls and other revenues derived from the operation or ownership of every project undertaken under the Trust Agreement are to be deposited. The budget required to be prepared under Section 505 of the Trust Agreement embraces all of the projects upon a combined basis undertaken pursuant to the provisions of the Trust Agreement. Under Section 506 of the Trust Agreement the moneys in said Revenue Fund are to be held by the Trustee in trust and are subject to a lien and charge in favor of the holders of all the bonds issued and outstanding under the Trust Agreement.

Section 1307 of the Trust Agreement reads as follows:

"The Authority hereby finds and determines that it would be economical and beneficial to combine into one unit the Southwestern Turnpike Project, the Eastern Turnpike Project and any remaining part of the

Eastern Route for which bonds may be issued under the provisions of this Agreement, and to consider the same as one project to the same extent and with like effect as if the same were a single project, and, as authorized by the Enabling Act, the same are hereby combined for financing purposes to the extent and with the effect set forth in this Agreement, including the establishment of a single sinking fund for the payment, purchase or redemption of all bonds issued under the provisions of this Agreement; provided, however, that nothing contained in this Agreement shall be construed as preventing the Authority from financing the Eastern Turnpike or any part thereof by the issuance of bonds which are not secured by the provisions of this Agreement and which are issued under the provisions of a separate trust agreement."

Section 507 of the Trust Agreement provides, in part, as follows:

"As provided in Section 1307 of this Agreement, a single special fund is hereby created and designated 'Oklahoma Southern Turnpikes Interest and Sinking Fund' (herein sometimes called the 'Sinking Fund'). There are hereby created three separate accounts in the Sinking Fund designated 'Bond Interest Account,' 'Reserve Account' and 'Redemption Account,' respectively. Another special fund is hereby created and designated 'Oklahoma Southern Turnpikes Reserve Maintenance Fund' (herein sometimes called the 'Reserve Maintenance Fund'.)

"The moneys in each of said Funds and Accounts shall be held by the Trustee in trust and applied as hereinafter provided with respect to each such Fund or Account and, pending such application, shall be subject to a lien and charge in favor of the holders of the

bonds issued and outstanding under this Agreement and for the further security of such holders until paid out or transferred as herein provided."

By the above quoted statute 69 O.S.Supp.1959 § 659, the Legislature specifically authorized the Turnpike Authority in its discretion to combine two or more turnpike projects or parts thereof into one unit. Surely this was a proper item for legislative action and the statute is plain.

It seems clear that the Authority may so combine these two projects, or if it could not sell bonds to fir nce these two projects as a unit, it could sell bonds and construct either one or the other of these two projects singly.

It should be noted that by law the Authority may not construct any Turnpike without legislative approval and action. The Legislature has specifically authorized the two Turnpikes formerly constructed, and now in operation, and the Legislature has specifically authorized the two Turnpike Projects here involved. No other or further Turnpike construction can be commenced until first authorized by subsequent legislative action.

Since the right and power of the Turnpike Authority to combine these two projects is so clearly established, we answer this ninth question in the affirmative.

[15] The Tenth Proposition presents the question whether Section 212 of the Trust Agreement relating to the issuance of Turnpike Revenue Refunding Bonds is valid and in conformity with applicable law, including particularly the second sentence of Section 669 of the Enabling Act.

Section 212 of the Trust Agreement authorizes the issuance of Turnpike Revenue Refunding Bonds of the Authority which may be issued under and secured by the Trust Agreement. These refunding bonds may be issued

for the purpose of providing funds for paying at their stated maturity or redeeming prior to their stated maturity all of the outstanding bonds of any Series, including the payment of any redemption premium thereon.

69 O.S.1951 § 669, reads as follows:

> "The Authority is hereby authorized to provide by resolution for the issuance of turnpike revenue refunding bonds of the Authority for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this Act, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds. Each refunding issue shall be limited to the project in connection with which the bonds being refunded were issued and revenues pledged to pay any such refunding issue shall be limited to the revenue derived from said separate project. The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect of the same, shall be governed by the provisions of this Act in so far as the same may be applicable."

It will be noted that the second sentence of Section 669 refers to "separate projects." Since under the law the Turnpike Authority may now proceed with either the Southwestern Turnpike Project or the Eastern Turnpike Project, or by specific provisions of law may combine both such Turnpike Projects into one unit, either way in which the Authority proceeds it will be engaging in a single project or a "separate project" within the meaning of Section 669, supra. Therefore there could not be any inconsistency between the provisions of Section 212 of the Trust Agreement and the provisions of the Statute, Section 669, above quoted.

And having fully heard and considered this matter upon the pleadings of the parties and briefs of the parties and appearance and oral presentation by and on behalf of all the parties, the Court finds that as referring to the Turnpike Projects and Bond Issues here involved, the Turnpike Authority in all things proceeded within their legal authority and in conformity with applicable law; that the several questions proposed should be and they are hereby answered and determined as above set out in this opinion and decision; that all of the Turnpike Revenue Bonds here involved have been properly authorized in conformity with applicable law, and that when issued in accordance with applicable statutory law and this decision these bonds of Oklahoma Turnpike Authority, as to both or as to either of these two Turnpike Projects here considered, such bonds when issued in accordance with applicable statutory law and this decision and all of them will constitute valid obligations in accordance with their terms, and therefore the Court, by this opinion and decision hereby approves the bond issues here presented, as this Court is authorized to do by specific provision of law.

The Court hereby fixes a period of 5 days within which a petition for rehearing may be filed herein.

WILLIAMS, C. J., concurs specially.

BLACKBIRD, V. C. J., concurs specially by reason of stare decisis.

HALLEY, JOHNSON and JACKSON, JJ., concur.

IRWIN and DAVISON, JJ., concur in part and dissent in part.

BERRY, J., concurs by reason of Rule of Law in the case.

WILLIAMS, Chief Justice (concurring specially).

I concur in some phases of the majority opinion in this case because of my belief that, as to those, such opinion announces or follows properly cognizable principles of the law of Oklahoma.

I feel constrained to concur with respect to at least one other portion of such opinion only because the law with reference to it was basically and in essence settled in a former decision of this court. See Application of Oklahoma Turnpike Authority, Okl., 348 P.2d 510, 518. In that case this court determined the validity of the very trust fund here involved, that revenues might be earmarked thereto, that they might be pledged, and further that the very Act here involved and its provisions authorizing financing and construction of the very Turnpikes here involved were constitutional and valid.

In paragraph 8 of the syllabus of the opinion in such former case, this court said, "The agreement or agreements for financing the two Turnpikes above referred to properly contain a provision that tolls shall continue to be charged on all Turnpikes until the bonds and the interest thereon, of all Turnpikes have been fully paid."

I did not then agree with this announced principle. Nor do I now. Nor do I agree with the answer to question IV in the present majority opinion reiterating such principle. See Article X, section 23, Oklahoma Constitution, of provision in part that: "The State shall never create or authorize the creation of any debt or obligation or fund or pay any deficit, against the State, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid * * *."

However, I feel bound by that principle inhering in a republican form of government, that when the Supreme Court has decided a particular matter finally, the decision

is binding. See 5B C.J.S. Appeal and Error § 1821, a and b, pp. 181, 190.

By Article VII, section 3 of the Constitution, it is provided, in part, "* * * A majority of the members of the Supreme Court shall constitute a quorum, and the concurrence of the majority of said court shall be necessary to decide any question. * * *"

The former decision settling this matter has long since become final. I therefore concur specially.

BLACKBIRD, Vice Chief Justice (specially concurring).

My individual views have never been in harmony with those expressed by the Majority on some of the questions involved here. However, in the previous case of Application of Oklahoma Turnpike Authority, Okl., 348 P.2d 510, involving The Oklahoma Turnpike Act of 1959 (Chap. 18c, S.L.1959, pps. 283, 292) the Majority of my Associates expressed views that must be regarded as decisive on a number of the same, or similar, questions in this case. By so doing, they committed this court to determinations, which are binding upon other Members of this Court, regardless of conflicting personal views. See State ex rel. Murphy v. Johnson, 185 Okl. 651, 95 P.2d 99, 100. It is solely because of this, that I now concur in the Majority opinion in this case.

IRWIN, Justice (special concurrence in part; dissenting in part).

I specially concur in that portion of the Third Question which specifically holds that the holders of the outstanding bonds issued to build the Turnpike Projects will not have an accrued and vested contract right in and to the continued apportionment of a portion of the motor fuel tax as provided in the Act and will not have a vested contract

right which would preclude a future legislature from repealing, reducing or otherwise changing the levy or rate of levy of the motor fuel tax, for these additional reasons.

Article X, Section 23, of our Constitution provides that the State shall never create or authorize the creation of any debt or obligation. Therefore, if any and all future legislatures were obligated to continue the apportionment of the motor fuel tax as provided in the Act for so long as any of the bonds are outstanding, or a sufficient amount shall have been set aside in trust for such purposes, that portion of the Act attempting to bind or obligate the State, acting through its legislature to continue such apportionment, would be unconstitutional.

I concur in the Fourth Question for the reason the Application of Oklahoma Turnpike Authority, Okl., 348 P.2d 510, which construed the Act in question, specifically determined and established the rule of law that the revenues of the "paid out projects" could be pledged. (See my dissenting views expressed in 348 P.2d 510, relating to this specific question.)

Proposition Six and Seven as set forth in the Authority's application are as follows:

Proposition Six is whether the said agreements between the Oklahoma Department of Highways and the Authority pursuant to which the said Department has agreed to undertake and complete within the time stipulated therein the portions of the Southwestern Route, including said bridges, with approaches thereto, over the South Canadian River and the Red River, and the portions of the Eastern Route described in *said agreements are valid and binding upon the parties thereto and otherwise in conformity with the Enabling Act and other applicable law and may performance of said Department's obligations thereunder be legally enforced against the Department of*

Highways by the Authority, the Trustee under the Trust Agreement or the holder of any of the Bonds?

Proposition Seven is whether the obligation assumed under said agreements by the Oklahoma Department of Highways to construct, and will its construction of, portions of the Southwestern Route and the Eastern Route and said bridges with approaches thereto and the expenditure therefor of State of Oklahoma highway funds, which may benefit the Southwestern Turnpike Project and the Eastern Turnpike Project and the holders of the Bonds, result in making the Bonds issued by the Authority debts or obligations within the meaning of Sections 23 and 25 of Article X, of the Constitution of Oklahoma?

The obligations the State Highway Commission has agreed to undertake and complete within a specified time relate to the construction by the State Highway Department certain highway facilities, including bridges and approaches thereto, on or near the two turnpikes in question. In this connection, the Highway Commission, by resolution, agreed that upon sale of the revenue bonds the Highway Commission would proceed with the construction of the specified highways, including bridges and approaches thereto, and open the same to traffic within a certain time.

I concur in that portion of the majority opinion which holds that said agreements of the State Highway Commission are not binding upon the parties thereto and the performance of such agreements, contracts or commitments by the State Highway Department or the State Highway Commission may not be legally enforced by the Authority, the Trustees under the Trust Agreement or the holder of any of the bonds.

I concur for the reasons set forth in the majority opinion and also for these additional reasons.

In exercising its discretion in planning and projecting in the future a highway program, the State Highway Commission's authority and power to enter into valid and binding contracts is not only governed by Legislative enactments but such contracts must be within the confines of the Constitution.

Title 69 O.S.1951 § 27.7, provides that expenditures and obligations of the State Highway Commission cannot exceed the appropriations and that expenditures or contracts in excess of appropriations are void. Section 27.7 states:

> "It is hereby declared to be the intent of the Legislature of this State that such Highway Commission, and the individual members thereof, shall so conduct and operate the affairs of the Commission that no expenditures shall be made in any department in any fiscal year, or obligation contracted therefor, in excess of the specific amount appropriated therefor by the Legislature. *Any expenditure made, or contract of whatsoever nature entered into by said Commission in any one fiscal year, for any purpose, in excess of the amount appropriated therefor by the Legislature or allocated or contributed by the Federal Government, shall be considered and is hereby declared to be void and of no force and effect;* provided however, that a pledge of funds to match Federal aid shall not constitute a violation of this Section; provided further, that this Section shall become effective and be in full force and effect as of July 1, 1939. Laws 1939, p. 276, § 7."

The Constitutional limitations are expressed in Article X, Sec. 23, which, inter alia, provides:

> "* * * Any department, institution or agency of the State operating on revenues derived from any law or laws which allocate the revenues thereof to such de-

partment, institution or agency, shall not incur obligations in excess of the unencumbered balance of surplus cash on hand * * * (Emphasis added).

"The State shall never create or authorize the creation of any debt or obligation * * * against the State, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid * * *"

It is apparent that any contract entered into by the State Highway Commission in excess of its appropriations for any fiscal year is null and void and of no force and effect under the Legislative enactment and it would be in contravention of the Constitution for Highway Commission to incur obligations in excess of the unencumbered balance of surplus cash on hand.

The Authority does not contend or even suggest that the State Highway Commission has sufficient unobligated funds or a surplus of cash on hand for the fiscal year ending June 30, 1961, to construct the highway facilities it agreed to construct on or near the two turnpike projects in question. Therefore, if the contracts, agreements and commitments of the State Highway Commission are presently operative, that is, operative within the fiscal year ending June 30, 1961, they are null and void and of no force and effect as such contracts are specifically prohibited by Legislative enactment and the Constitution.

On the other hand, if the contracts are to become operative and effective after June 30, 1961, the contracts would be unconstitutional as such would be incurring obligations in excess of the unencumbered balance of cash surplus on hand and would be pledging and allocating funds to be appropriated by future legislatures. In effect, the Department of Highways, which Article XVI, Sec. 1, of the Constitution directs the legislature to establish, would be attempting to do that which the legislature could not do, namely, laying

its mandate on a future legislature. In Boswell v. State, 181 Okl. 435, 74 P.2d 940, 947, this Court said:

> "As we conceive it, the constitutional provisions dealing with the 'debt limit' of the state were adopted for the purpose of fixing the power and responsibility of legislation relating to the fiscal affairs of the state upon the existing legislative assembly, and to prevent one legislative assembly from laying is mandate upon a future one. The effect of these provisions is that one legislative assembly cannot guarantee the span of life of its legislation relating to the fiscal affairs of the state beyond the period of its biennium."

I can only conclude that if we construe the agreements or commitments made by the State Highway Commission to be contractual obligations, effective immediately or to become effective in the future, they are null and void and of no force and effect as they would be in contravention of Legislative enactments and the Constitution.

On the other hand, if they are not contractual obligations which could be legally enforced, as set forth in the majority opinion, they have no more force and effect than any other road project contemplated to be constructed by the State Highway Commission.

Title 69 O.S.1959 Supp. § 655, subdivision (4), provides:

> "All access roads interchanges, or lead roads connecting such turnpikes with existing highways must be built by funds furnished by the Turnpike Authority."

In my judgment there is insufficient evidence before this Court to consider whether or not the roads to be constructed by the State Highway Commission are access roads, interchanges, or lead roads connecting such turnpikes with existing highways.

I am authorized to state that Mr. Justice DAVISON concurs in the views herein expressed.

Order Denying Motion for Rehearing and Motion to Vacate.

WILLIAMS, Chief Justice.

On October 17, 1960, this court entered its order denying the application of Protestant, Bill Hoover, for an order referring this case to a Referee of this court for the taking of evidence and testimony upon alleged questions of fact. Thereafter, and on October 21, 1960, the said Bill Hoover filed in this court a "Motion to Vacate and Set Aside Order Denying Application for Reference; and for Rehearing and Reconsideration Thereof." In said motion it is asserted that the application of the Turnpike Authority and the protests of Protestant and others raise numerous questions and issues of fact which are or may be controverted.

We carefully considered Protestant's motion prior to and in connection with our opinion on the merits in this case and on consideration of petition for rehearing concluded that there were no decisive and controlling issues of fact mentioned or presented which would make it necessary to refer the case to a Referee for the purpose of taking evidence and testimony.

Having concluded that there were no fact questions presented necessitating the reference of the case to a Referee it is ordered that the motion of Protestant, Bill Hoover, to Vacate and Set Aside Order Denying Application for Reference and for Rehearing and Reconsideration be and the same is, hereby denied.

WELCH, Justice (dissenting to denial of rehearing).

I respectfully dissent to the complete denying of the petitions for rehearing. I am convinced that the answer to "The Third Question", as set out in the majority opinion is not wholly adequate. I agree with that answer as far as it goes in permitting maintenance and pledging of this segregated Trust Fund, but believe we should go further and fully answer this question in the affirmative.

That would more closely follow the legislative intent as clearly expressed in the Act, 69 O.S.Supp.1959, §§ 680, 682 and 683, and would recognize that revenue produced by using motor fuel on the turnpike system and paying a specified tax per gallon on motor fuel there used may be treated as turnpike revenue, with specific legislative sanction, and thus may be fully pledged as set out in Sec. 683, supra.

Sections 680 and 683 are copied in full in the majority opinion, also in our opinion in Application of Oklahoma Turnpike Authority; Okl., 348 P.2d 510, at pages 514 and 515, and we there stated the provisions of Section 682. In the body of the opinion in that decision, which was considering this identical Act, it was stated at page 515:

> "When a motor vehicle travels over the turnpike, the Authority and everyone else observes the complete propriety and legality of collecting a toll to apply to pay for the Turnpike. Since the same trip necessarily consumes gasoline on which the traveler pays a specific tax per gallon, the Authority urges there is equal propriety and legality in applying a legislatively stated portion of that motor fuel tax for possible permissive use to pay for the Turnpike."

And at page 516:

> "Furthermore, if any money is spent by Authority out of the trust fund created with or from motor fuel

taxes, it will only be a temporary use or expenditure since provision is made for its repayment into the fund by Authority.

"Turnpikes are public highways. Application of Oklahoma Turnpike Authority, 203 Okl. 335, 221 P.2d 795. The above use of the stated portion of motor fuel tax funds is a use for a public purpose, and in fact is a public highway use.

"Upon public hearing and oral argument the protestant now admits that upon a more studied construction of the Act, this provision for the specific use of the stated portion of motor fuel tax does not amount to the creation of any debt against the State, or constitute any illegal use of such tax money. Nevertheless, it is this court's duty to consider and to determine such questions.

"We deem further discussion unnecessary. It is plain from the provisions of the Act, and from what we have said above, that this apportionment of part of the tax from motor fuel consumed on the several turnpikes into a segregated trust fund, and the possible permissive use of such fund, and the possible making of expenditures therefrom does not constitute any illegal use of such tax money, nor does such provision create any debt against the State of Oklahoma. This conclusion seems to us to be in complete harmony with this court's decisions in the several Turnpike cases heretofore decided and cited in an earlier paragraph of this opinion."

And in paragraph three of the syliabus in that case we held as follows:

"The Legislature may apportion a specifically stated part or portion of the tax collected from motor fuel consumed on turnpikes of Oklahoma to a Trust Fund to be used as a guarantee for the payment of interest upon Turnpike Bonds subsequently issued for the construction of additional Turnpikes which are authorized by law, and the provisions in Sections 1, 3 and 4, in the 1959 Turnpike Act, House Bill 932 of the 1959 Legislature, 69 O.S.1959 Supp. Sections 680, 682 and 683 providing therefor are valid."

It seems to me that the above determination in that case in January, 1960, would guide and require us to change the majority opinion in this case as here requested and urged by the Turnpike Authority.

The Turnpike Authority here urges that a full affirmative answer to this third question is legally justified as being well within the legislative power, and I believe it is so, and that the majority opinion should be expanded and liberalized to that extent.

I am authorized to say that BLACKBIRD, V. C. J., and HALLEY and JOHNSON, JJ., concur in these dissenting views.

WELCH, J.

EXHIBIT B

Filed in Supreme Court
of Oklahoma
February 14, 1961
Andy Payne—Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN TURNPIKE AND ON THE EASTERN TURNPIKE	No. 39,359

ORDER

Now on this 13th day of February, 1961, the court having before it and having considered Application of Bill Hoover for Oral Argument, the petition for rehearing of Protestant Bill Hoover, petition for rehearing and motion to modify and clarify opinion of John H. Russell, A. R. Walker and W. H. Harrower, and petition for rehearing of Turnpike Authority.

And having observed in said pleadings some reference to alleged issues of fact upon which this court should have heard testimony and received evidence, or by reason of which issues of fact the court should have referred said cause in its entirety to a referee for hearing and evidence;

The court has again examined the pleadings and the briefs of the parties and again considered the oral argument of the parties and upon said examination and consideration the court does not observe any material issue of fact in this case which could properly have been the subject of evidence or reference herein;

[APPENDIX]

And since the petitions for rehearing do not specifically set out any such items relied upon as issues of fact, and for the further reasons above shown, the court finds that there are not and were not issues of fact to be determined herein between the applicant and any of the protestants or parties.

And the court having further considered all of the aforesaid petitions for rehearing, and being advised in the premises, finds that the application for oral argument, motion to clarify and said petitions for rehearing all should be and they are hereby denied.

DONE BY ORDER OF THE COURT in conference this 13th day of February, 1961.

/s/ Ben T. Williams
Chief Justice

Irwin, J. Dissents

EXHIBIT C

FILED
Supreme Court
of Oklahoma
Mar. 1, 1961
Andy Payne
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	)	No. 39,359

ORDER DENYING MOTION FOR REHEARING AND MOTION TO VACATE

On October 17, 1960, this court entered its order denying the application of Protestant, Bill Hoover, for an order referring this case to a Referee of this court for the taking of evidence and testimony upon alleged questions of fact. Thereafter, and on October 21, 1960, the said Bill Hoover filed in this court a "Motion to Vacate and Set Aside Order Denying Application for Reference; and for Rehearing and Reconsideration Thereof." In said motion it is asserted that the application of the Turnpike Authority and the protests of Protestant and others raise numerous questions and issues of fact which are or may be controverted.

We carefully considered Protestant's motion prior to and in connection with our opinion on the merits in this case and on consideration of petition for rehearing concluded that there were no decisive and controlling issues of fact mentioned or presented which would make it neces-

sary to refer the case to a Referee for the purpose of taking evidence and testimony.

Having concluded that there were no fact questions presented necessitating the reference of the case to a Referee it is ordered that the motion of Protestant, Bill Hoover, to Vacate and Set Aside Order Denying Application for Reference and for Rehearing and Reconsideration be, and the same is, hereby denied.

DONE BY ORDER OF THIS COURT IN CONFERENCE ON THIS THE 21st DAY OF FEBRUARY, 1961.

/s/ Ben T. Williams
Chief Justice

EXHIBIT D

FILED in the
Supreme Court of Oklahoma
Oct. 1, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	))))))	No. 39,359.

APPLICATION

COMES now the Oklahoma Turnpike Authority, (herein referred to as "Authority") created under Sections 651-695 of Title 69 of the Oklahoma Statutes Annotated, as amended (herein referred to as the "Enabling Act"), and makes application to this Court pursuant to Section 668 of the Enabling Act for the approval by the Court of the turnpike revenue bonds of the Authority to be issued in the principal amount of $59,000,000 for the purpose of defraying the cost of a turnpike project constituting parts of and being on the turnpike (herein called the "Southwestern Route") authorized by and described in Section 655 (e) (2) of Title 69 of the Enabling Act and one fourth (¼) of the cost of a bridge, with approaches thereto, to be built by the Department of Highways of the State of Oklahoma across the South Canadian River on the route of the Southwestern Turnpike as authorized by said Section 655 (e) (2), and in the principal amount of $31,000,000 for the purpose of defraying the cost of a turnpike project constituting part of and being on the turnpike (herein called the "Eastern Route") authorized by and described in Section 655 (e) (4) of the Enabling Act.

* * * * * * *

14. In order to obtain an approving legal opinion from nationally-recognized bond counsel on said bonds and thus enable the Authority to sell and issue said bonds, it is necessary, and the Authority hereby respectfully requests, that this Court approve the validity of said bonds and, in connection therewith, resolve the following legal questions appertaining to the security and marketability of the Bonds:

a. Are the official actions and proceedings of the Authority respecting the authorization and the approval of the location, construction and financing of the Southwestern Turnpike Project and the Eastern Turnpike Project, the authorization and issuance of the bonds, and the authorization of the execution and delivery of the Trust Agreement, and the provisions of the Trust Agreement, valid and in conformity with the Enabling Act and other applicable law.

b. Do the holders of the Bonds have, so long as any of the Bonds are outstanding, an accrued or vested contract right—

(1) in and to an exclusive pledge by the Authority under the Trust Agreement of deposits accumulated in the Trust Fund for making up any deficiency in the moneys available to meet interest requirements on the Bonds issued under the provisions of the Trust Agreement, as provided in Section 683 of the Enabling Act, and for the payment of interest on the Bonds as it becomes due and payable during the period of construction as specified in Section 404 of the Trust Agreement?

(2) in and to the continued apportionment to the Authority by the State of Oklahoma each calendar month of 97% of an amount equal to the motor fuel excise taxes computed on 97½% of

the total gallonage of all fuels consumed during the calendar month in which the tax being apportioned accrued on all Oklahoma Turnpike projects and the continued deposit in the Trust Fund established pursuant to the Enabling Act of the full amount of each such apportionment until the balance in the Trust Fund reaches the statutory maximum, all in the manner and to the extent provided in the Enabling Act; provided, however, that no right shall thereby be vested precluding the legislature of the State of Oklahoma from repealing, nullifying, reducing, maintaining at its present rate or otherwise changing the levy or the rate of levy of such motor fuel taxes?

(3) in and to an exclusive pledge under the Trust Agreement of the revenues of the "paid-out projects" as provided in Section 667 of the Enabling Act and the continued operation of said "paid-out projects" as toll facilities under said Section?

(4) in and to the requirement in the Trust Agreement that investments of moneys in said Trust Fund shall be confined exclusively to obligations or securities the principal of and interest on which are unconditionally guaranteed by the United States of America?

c. Are the said agreements between the Oklahoma Department of Highways and the Authority pursuant to which the said Department has agreed to undertake and complete within the time stipulated therein the portions of the Southwestern Route, including said bridges, with approaches thereto, over the South Canadian River and the Red River, and the portions of the Eastern Route described in said agreements valid and binding upon the parties thereto and otherwise in

conformity with the Enabling Act and other applicable law and may performance of said Department's obligations thereunder be legally enforced against the Department of Highways by: (a) the Authority, (b) the Trustee under the Trust Agreement or (c) any holder of the Bonds?

d. Does the obligation assumed under said agreement by the Oklahoma Department of Highways to construct, and will its construction of portions of the Southwestern Route and the Eastern Route and said bridges with approaches thereto and the expenditure therefor of State of Oklahoma highway funds, which may benefit the Southwestern Turnpike Project and the Eastern Turnpike Project and the holders of the Bonds, result in making the Bonds issued by the Authority debts or obligations within the meaning of Sections 23 and 25 of Article X of the Constitution of Oklahoma?

e. May the Authority's pledge of deposits in said Trust Fund be lawfully confined to secure the Bonds issued under the Trust Agreement, excluding from the benefits thereof bonds issued for other turnpike projects that may be authorized hereafter by the Legislature, or is it necessary under the Enabling Act that the pledge be extended to cover both said bonds issued for projects hereafter authorized by the Legislature and the Bonds issued under the Trust Agreement, and, if such pledge must thus be extended, what guides, standards, order of precedence, or priorities shall be followed or applied in effectuating the pledge of deposits in said Trust Fund among such bonds?

f. Are the provisions of the Trust Agreement combining, for financing purposes, into one unit and treating as a single project the Southwestern Turnpike Project, the Eastern Turnpike Project and any other project or projects on the Eastern Route for which

Bonds are issued under the Trust Agreement and establishing a single Sinking Fund for all such Bonds, valid and in conformity with applicable law, including particularly Section 659 of the Enabling Act authorizing the combining of two or more projects and Section 661 of the Enabling Act preventing the use of Sinking Fund moneys for the payment, purchase or redemption of any bonds that have not been issued to construct the project from which such moneys were derived?

g. Taking into consideration the provision of the Trust Agreement and the Enabling Act mentioned in the preceding subparagraph f., is Section 212 of the Trust Agreement relating to the issuance of turnpike revenue refunding bonds valid and in conformity with applicable law, including particularly the second sentence of Section 669 of the Enabling Act?

15. That a copy of the notice of the hearing of this Application, attached hereto, marked "Exhibit J") and made a part of this Application, is being published in the Daily Oklahoman of Oklahoma City, Oklahoma. The proof of the publication of said notice will be filed with the Clerk of this Court.

EXHIBIT E

FILED in the
Supreme Court of Oklahoma
Oct. 13, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	)	No. 39,359

PROTEST, OBJECTION AND CONTEST TO THE APPLICATION OF OKLAHOMA TURNPIKE AUTHORITY FOR APPROVAL OF ISSUANCE OF TURNPIKE REVENUE BONDS

Comes now the undersigned, hereinafter referred to as "Protestant", and in response to the Application of Oklahoma Turnpike Authority for the Approval of the Issuance of Turnpike Revenue Bonds of the Authority for Defraying the Cost of Projects on the Southwestern Route and on the Eastern Route, heretofore filed in this cause, files his protest, objection and contest thereto, and in connection therewith, shows the Court:

1. Protestant is a citizen of Oklahoma, and a person interested in this cause and the subject matter of this action. He is authorized and entitled by law and by the application and notice filed herein to file this protest.

2. Protestant files herein his objection, contest and protest to the Application, and to the approval and issuance of any and all bonds therein described; and his objection and protest to the granting of any and all of the relief prayed for in the Application. Protestant contests

and denies the legality of the bonds described in the Application, and the legality of issuance, thereof by the Authority; and further contests and denies the legality, constitutionality, propriety and lawful authority of the Application, and all proceedings referred to therein, or had in connection therewith.

3. Protestant files his objection, contest and protest for each and all of the reasons and upon each and all of the grounds set out below; and upon each and every legal ground appearing from the pleadings, evidence and proceedings in connection with the Application, whether or not specifically set out or referred to herein.

4. Protestant denies each and every allegation, conclusion, suggestion and contention of the Applicant except such as may be admitted herein or established by competent evidence; and denies that Applicant is entitled to any or all of the relief prayed for in the Application, or any relief whatever in consequence thereof.

5. Protestant denies that any of the several actions purported and attempted to be taken heretofore, and the several actions planned, contemplated and anticipated to be taken in the future; by the Authority and the Highway Commission, all as described in the Application, were lawful, constitutional, authorized, justified, or within the power, authority or discretion of the agency or body concerned.

6. For his protest, objection and contest to the Application, and to the issuance of the bonds pursuant thereto, Protestant makes his response specifically to paragraph 14 of the Application, and the several questions there propounded, as follows:

QUESTION (a)

The official actions and proceedings of the Authority respecting the authorization and approval of the location, construction and financing of the Southwestern Turnpike

Project and the Eastern Turnpike Project, and other proceedings in connection therewith, are not valid nor in conformity with the Enabling Act and other provisions of law; but instead are illegal, invalid and contrary to the Constitution and laws of Oklahoma, and null and void for each of the following reasons:

(1) The action of the Authority in approving the construction and financing of the Eastern Turnpike, and the Southwestern Turnpike as feasible and economically sound, either separately or in conjunction with each other, was illegal, unjustified, and contrary to all available engineering, traffic, financial and other information as to feasibility; and the approval thereof contrary thereto constituted abuse of discretion, plain disregard of duty, gross abuse of power, and in violation of law; and was made in reckless disregard of engineering and financial information then available.

(2) Each of the specific objections, protests and contests set out herein with regard to each of the other questions submitted in paragraph 14 of the Application is equally applicable to Question (a), and is incorporated herein as an objection hereto as if set out at length.

QUESTION (b)

The holders of the proposed bonds do not have an accrued or vested contract right in any of the matters set out in sub-paragraphs (1) through (4) of Question (b), for the reasons set out below:

(1) The Court lacks jurisdiction to determine this question or any of its sub-paragraphs pursuant to 69 O.S. (1959) Sec. 668. The jurisdiction of the Court is limited to determination of the validity of bonds sought to be issued pursuant to applicable law; and the Court is without jurisdiction to render an advisory opinion as to contract rights, vested or otherwise, in advance of creation of such contracts or contract rights.

(2) Without waiving objection to jurisdiction of the Court, the provisions of the Trust Agreement as to the matters involved in this question and the purported contract rights sought to be created thereby are contrary to the Constitution of Oklahoma, and applicable provisions of law.

(3) The purported contract rights sought to be established, would violate Article 10, Sections 23 and 25 of the Constitution of Oklahoma, by attempting to create a debt or obligation against the State.

(4) The purported contract rights sought to be established would violate Article 10, Section 15, of the Constitution of Oklahoma as attempting to give, loan or pledge the credit of the State of Oklahoma to a person, or other legal entity.

(5) The purported contract rights sought to be created would violate Article 10, Section 19, of the Constitution of Oklahoma, by devoting and enforcing the use of taxes levied and collected for one purpose to another purpose.

(6) The purported contract rights sought to be created would not be enforceable by any bondholders, the trustee or the Authority; and any attempted enforcement thereof by action would constitute a suit against the State, upon a cause of action within its sovereign immunity.

(7) The State as sovereign and its citizens have vested rights in the motor fuel excise taxes and in any toll roads hereafter paid out which is superior to any purported vested contract rights sought to be established herein.

(8) The vested contract rights sought to be established constitute an illegal attempt to control the action of the legislature and to prevent it from amending or repealing the present law, as to allocation of motor fuel taxes, and the continuation and allocation of tolls on paid out projects; and an attempt to control the future actions of the

legislature in appropriation of funds and the action of State officials in the allocation and payment thereof. Any such purported action would be an unlawful delegation of legislative power, or would violate the Constitutional provisions as to separation of powers of government.

(9) In any event, no vested contract rights could accrue to any bondholder until bonds are actually purchased by him, and only to such extent and in compliance with the law then existing. Prior to actual sale of bonds for value, the legislature may repeal, amend or alter any portion of the applicable statutes without affecting any purported contract rights of bondholders. The rights, if any, of each bondholder would depend upon the law existing at the time of his purchase thereof. Such rights cannot be adjudicated in this action.

QUESTIONS (c) AND (d)

The agreements between the Authority and the State Highway Department, referred to in the Application, relating to the construction by the Highway Department of portions of the respective turnpikes, are unconstitutional, illegal, null and void; and cannot be enforced by the Authority, the trustee or any bondholder, for each of the following reasons:

(1) The contracts, if binding upon the Highway Department, would constitute debts and obligations against the State, in violation of Article 10, Sections 23 and 25 of the Constitution of Oklahoma.

(2) The contracts, if binding upon the Highway Department, would seek to allocate or encumber the funds of the Highway Department in excess of the unencumbered balance remaining in the appropriation for that department for the current fiscal year and for the current biennium, all in violation of the Constitution and laws of Oklahoma, including Article 10, Section 23 of the Con-

stitution, and 69 O.S. (1951) 27.7, and 62 O.S. (1951) 41.1-41.38.

(3) The contracts, if binding upon the Highway Department, would seek to allocate or encumber funds to be appropriated by the legislature in future fiscal years, in violation of Article 10, Sections 23 and 25 of the Constitution, and applicable statutes; and if valid would constitute an unlawful delegation of legislative power and violate Constitutional provisions as to separation of powers of government.

(4) The contracts seek to allocate, encumber or otherwise obligate the United States of America, and the Bureau of Public Roads of the United States, for the payment of large amounts of matching funds with relation to projects referred to therein, as to which the United States has not assumed an enforceable obligation: all in violation of the United States Constitution, and contrary to the laws of the United States, and in particular, the Federal-Aid Highway Act of 1956, as amended.

(5) Any purported vested contract rights sought to be established obligating the State of Oklahoma and the Highway Department to construct the roads described, or to continue to operate and maintain those roads while any bonds remain outstanding, would constitute debts or obligations of the State in violation of the Constitution of Oklahoma, and the statutes herein referred to.

(6) The purported vested contract rights sought to be established under the Trust Agreement are contrary to the purported contracts between the Authority and the Highway Department, and in excess of the provisions and obligations thereof.

(7) All or portions of the roads referred to in the contracts to be built by the Oklahoma Highway Commission constitute access roads, interchanges or lead roads, as

defined by law, and specifically, 69 O.S. (1959), Section 655, which are required to be built entirely by funds furnished by the Authority.

(8) The purported contracts were not executed, reviewed, or approved according to law, or submitted to the Budget Director in accordance with the provisions of the Budget Law of 1947, as amended, and particularly 62 O.S. (1951) Section 41.16; nor were the projects therein described which the Highway Department sought to obligate itself to construct thereby, programmed, contracted, let, budgeted, nor funds allocated therefor, all as required by law. Such purported contracts are not binding upon the State, the Highway Department, or the United States of America; and no vested contract rights could or did accrue thereunder in favor of any person.

(9) The purported vested contract rights cannot be legally enforced against the Department of Highways by any person; and any attempt to enforce the same by action would constitute a suit against the State upon a cause of action within its sovereign immunity.

(10) The purported vested contract rights would constitute an unlawful attempt to control or direct the action of the legislature in future appropriation of funds; and the action of departments of state government in allocation of appropriated funds.

(11) No purported vested contract rights sought to be established could force or require the legislature hereafter to appropriate funds for the construction of all or part of the roads referred to in the contract, or sufficient funds for the construction thereof; or could prevent or prohibit the legislature from failing to appropriate funds for the purpose, or earmarking appropriations for other purposes, or providing in future appropriation laws that no funds therein appropriated would be used for the con-

struction of the projects therein referred to. Any purported vested contract rights sought to have that effect would be illegal, unconstitutional, null and void.

(12) The participation of the Highway Department in the construction of the Southwestern Turnpike and the Eastern Turnpike, or parts of either; and the construction, maintenance and operation of portions thereof with public funds raised through state taxation, renders all or part of each such turnpike a part of the State Highway System, as established by law, and bonds sold for financing portions of such turnpikes would constitute debts or obligations of the State in violation of the constitutional provisions hereinabove referred to.

(13) The construction and operation of portions of each turnpike by the State Highway Department with public funds raised through state taxation, constitutes a gift, loan or pledge of the credit of the State to the Authority, the trustee and the bondholders, all in violation of Article 10, Section 15 of the Constitution of Oklahoma.

QUESTION (e)

The Authority's pledge of deposits in the trust fund may not be limited to bonds issued under the terms of the Trust Agreement here under consideration; but must extend to agreements financing future turnpike projects, for the following reasons:

(a) Any such provision in the trust indenture, or any vested contract right sought to be established thereby, would be contrary to law, and specifically 69 O.S. (1959) Secs. 680 and 683.

(b) This Court is without jurisdiction to issue an advisory opinion establishing guides, standards, order of precedence, or priorities to be followed or applied among future projects; such being a legislative or administrative

function, not judicial. This Court's jurisdiction is limited to passing upon the validity of a proposed bond issue pursuant to 69 O.S. (1959) Section 668.

QUESTIONS (f) AND (g)

The provisions of the Trust Agreement relating to creation of a single sinking fund for retirement of bonds for the Southwestern and Eastern Turnpikes are invalid and contrary to law for the following reasons:

(1) There was no official action or resolution by the Authority combining the projects in one unit to be considered as one project, as required by law.

(2) The projects were not in fact combined into one unit or considered as one project, as required by law.

(3) Bonds are not to be issued for financing the single project consisting of the two projects combined into one unit; but instead separate bonds are proposed to be issued to finance each of the two projects separately.

(4) Except for establishment of a single sinking fund, the projects are treated separately for virtually all purposes in the actions and resolutions of the Authority and in the terms and provisions of the Trust Agreement.

(5) For similar reasons, Section 212 of the Trust Agreement is contrary to law.

WHEREFORE, the undersigned Protestant respectfully prays the Court to hear and entertain his Protest; to refer the cause to a Referee of the Court for the taking of evidence and testimony upon those issues and questions as to which there will or may be controverted issues of fact; and upon full hearing and after consideration of the Application of Authority and the Contest, Objection and Protest of the undersigned, the Court issue its Order and Judgment:

(1) Sustaining the protest upon each and all of the unds herein set out.

(2) Disapproving each of the turnpike bond issues posed by the Authority.

(3) Disapproving and declaring illegal, null and void h of the proposed bond issues and the Trust Agreement posed as security therefor.

(4) Answering negatively and disapproving each of e questions of law propounded herein.

(5) Entering judgment in favor of protestant and ainst the Authority upon each and all of the issues, estions and contentions involved in these proceedings.

(6) For all further just and proper relief to which otestant may be entitled.

BILL HOOVER
Protestant

Charles R. Nesbitt
James C. Hamill

ATTORNEYS FOR PROTESTANT

Counsel:

ack Braly
a, Oklahoma

EXHIBIT F

FILED in the
Supreme Court of Oklahoma
Oct. 17, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	No. 39,359

APPLICATION FOR REFERENCE TO A REFEREE FOR TAKING OF EVIDENCE AND TESTIMONY UPON ISSUES OF FACT

Protestant respectfully moves the Court, pursuant to the Rules of this Court, and particularly Rule 39, to refer this cause to a Referee of this Court, for the purpose of taking evidence and testimony upon questions of fact raised by the pleadings, and essential to the adjudication of the issues involved herein.

In support of his motion and application, protestant shows the Court the following:

(1) The questions and issues raised by the Application of the Authority, and the Contest, Objection and Protest of Protestant involve numerous questions of fact which are or may be controverted or contested. The presentation of evidence and testimony upon each of these questions of fact is essential to the determination thereof, and the adjudication of the issues of law involved in this cause.

(2) Each of the questions of fact here presented, which is or may be controverted, is relevant and material to one or more of the issues of law involved herein, and essential to the adjudication thereof.

(3) Protestant attaches his affidavit in support of this Application, setting out in brief form some of the matters and issues of fact as to which taking of evidence and testimony is desired and essential to the adjudication of his cause.

(4) The matters and issues of fact can be presented and determined only by the introduction of evidence and documents, and the presentation of testimony of numerous witnesses. Presentation of evidence will consume considerable time, and presentation thereof to the Court en banc would be unduly burdensome upon the Court and the Justices.

WHEREFORE, Protestant prays that this cause be referred to a Referee of this Court for the taking of evidence and testimony, and that the cause be set for hearing before the Referee at a convenient time, allowing the parties a reasonable time for preparation and presentation of their evidence.

Charles R. Nesbitt

OF COUNSEL FOR PROTESTANT

EXHIBIT G

FILED in the
Supreme Court of Oklahoma
Oct. 17, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN RE: APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN TURNPIKE	No. 39,359

ORDER

It is hereby ordered that the application for reference of cause to a referee be and it is denied.

DONE BY ORDER OF COURT IN CONFERENCE this 17th day of October, 1960.

Denver N. Davison
CHIEF JUSTICE

EXHIBIT H

FILED in the
Supreme Court of Oklahoma
Oct. 21, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	)	No. 39,359

MOTION TO VACATE AND SET ASIDE ORDER DENYING APPLICATION FOR REFERENCE AND FOR REHEARING AND RECONSIDERATION THEREOF

Protestant, Bill Hoover, respectfully moves the Court to vacate and set aside its Order dated October 17, 1960, denying the Application for Reference to a Referee for Taking of Evidence, and Testimony Upon Issues of Fact, heretofore filed by Protestant in this cause; and moves the Court to grant a rehearing upon and reconsideration of Protestant's Application for Reference.

In support of his motion, Protestant respectfully shows the Court the following:

1. The Application of the Authority and the Protests of Protestant and others raise numerous questions and issues of fact which are or may be controverted. Argument before this Court on October 17, 1960, upon Protestant's Application for Reference, clearly demonstrated that serious questions and issues of fact are involved in this cause, upon each of which the presentation of evidence and testimony is essential to the determination thereof

and the adjudication of the issues of law involved herein. The Application for Reference, with accompanying Affidavit, are incorporated herein by reference, as if set out herein at length.

2. By Order entered October 17, 1960, this Court denied Protestant's Application for Reference. The denial of the Application for Reference has denied to Protestant and to others similarly situated a trial or hearing; has denied them a full and fair hearing upon questions and issues of fact; and has denied them their day in court.

3. On the same day, October 17, 1960, this Court entered its Order in this cause staying proceedings in Cause No. 150,879, District Court of Oklahoma County, Oklahoma, styled *John H. Russell et al* v. *Roy J. Turner et al*, in which pending cause some or all of the same questions and issues of fact were presented or involved. The Order of this Court of October 17, 1960, is incorporated herein by reference, as if set out at length.

4. The Order staying further proceedings in the District Court cause, in conjunction with the Order denying Protestant's Application for Reference, has denied and will deny to Protestant and to all others similarly situated who are protestants, objectors and litigants adverse to the Applicant herein, a hearing, a full and fair hearing, and their day in court.

5. The action and order of this Court in denying Protestant's Application for Reference, of itself, or in conjunction with the stay of proceedings in the District Court action, violates and contravenes the Constitution of the United States, and in particular, the due process clause of the XIV Amendment to the United States Constitution; and such action and order is unconstitutional, illegal, null and void.

WHEREFORE, Protestant respectfully prays the Court to vacate and set aside its Order of October 17, 1960, deny-

ing Protestant's Application for Reference; and to grant rehearing upon and reconsideration of Protestant's Application for Reference.

Protestant further prays that further oral argument be allowed upon his Application for Reference; and upon conclusion thereof, and upon reconsideration of the Application, this cause be referred to a Referee of this Court for taking of evidence and testimony upon issues and questions of fact involved herein and essential to the determination hereof.

BILL HOOVER, PROTESTANT
By C. R. Nesbitt
of Counsel for Protestant

EXHIBIT I

FILED in the
Supreme Court of Oklahoma
Oct. 31, 1960
Andy Payne, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	)	No. 39,359

ORDER

Now on this 31st day of October, 1960, came on for consideration the Motion of Protestant, Bill Hoover, to vacate and set aside our Order of October 17, 1960, wherein we refused to refer the above-entitled matter to a Referee of this Court for the taking of testimony upon issues of fact.

We have given careful attention to Protestant's original Motion, his present Motion now pending to vacate and set aside our former Order denying his application for reference, together with his present Motion or Petition for Rehearing and reconsideration thereof, and his prayer for further oral argument upon his application for reference, all as set forth in his Motion filed in this Court on October 21, 1960, and have concluded that this Motion and the relief prayed for therein should be denied.

The Court is of the opinion that the instruments, agreements, and contracts executed in connection with

the proposed issuance of Turnpike Revenue Bonds amply set forth all of the facts that will be necessary for a disposition of the questions presented, but if they do not then this Court may upon its own Motion direct a Referee of this Court to take testimony upon notice to the parties and protestants.

Having so concluded, it is ordered that the relief prayed for in Protestant's Motion filed herein on October 21, 1960, be and the same is hereby denied.

DONE BY ORDER OF THE COURT IN CONFERENCE this 31st day of October, 1960.

Denver N. Davison
Chief Justice

EXHIBIT J

FILED in the
Supreme Court of Oklahoma
Jan. 31, 1961
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR THE APPROVAL OF THE ISSUANCE OF TURNPIKE REVENUE BONDS OF THE AUTHORITY FOR DEFRAYING THE COST OF PROJECTS ON THE SOUTHWESTERN ROUTE AND ON THE EASTERN ROUTE	)	No. 39,359

PETITION FOR REHEARING

Protestant, Bill Hoover, respectfully petitions this Court to grant a rehearing in this cause; to withdraw the opinion and decision filed herein on January 26, 1961; and upon rehearing and reconsideration of this cause and the questions involved, to render and file a new decision and opinion herein in accordance with the applicable principles of law controlling the issues involved herein.

In support of his application for reconsideration and rehearing of this cause, protestant respectfully represents and shows to the Court that on January 26, 1961, this Court filed its decision and opinion in this cause, answering and determining certain questions submitted by the Authority in its application; approving the proposed trust indenture and proposed Turnpike Revenue Bonds, for the construction respectively of the Southwestern Turnpike Project and the Eastern Turnpike Project, upon terms and conditions set out in the opinion; and determining that such bonds and bond issues when issued in accordance with applicable statutory law and the decision of this Court, will constitute valid obligations in accordance with their

terms. In such opinion and decision, the Court fixed a period of five days, or until January 31, 1961, within which a petition for rehearing might be filed.

Protestant respectfully requests a rehearing and reconsideration of this cause upon each and all of the following grounds:

(1) The action of this Court in denying protestant's application to refer this cause to a referee for taking evidence and testimony upon issues of fact, and in denying protestant's later motion to vacate the order to that effect, and for rehearing and reconsideration thereof, has denied to protestant and others similarly interested a trial or hearing, has denied them a full and fair hearing on questions and issues of fact, and has denied them their day in court, all in contravention of the Constitution of the United States, and in particular the due process clause of Amendment XIV of the Constitution.

(2) In the opinion and decision issued and filed herein on January 26, 1961, this Court undertook to decide various questions and issues of fact, and further assumed the existence of various facts, as a necessary basis for its decision upon various questions and issues of law. Such facts assumed and decided were wholly without support in the record, and directly contrary to the evidence before the Court; and were issues of fact for the determination of which protestant sought a hearing and an opportunity to present evidence and testimony; which application was repeatedly denied by this Court. Such action and decision of this Court contravened the Constitution of the United States, and particularly the due process clause of Amendment XIV to the Constitution.

* * * * * * *

(9) The decision of the Court as to the First Question propounded by Authority is erroneous and contrary to the United States Constitution, and the Constitution and

Statutes of Oklahoma, and the controlling decisions of this Court. This Court erroneously undertook to decide questions of fact, and to assume the existence of facts, as a necessary basis for the decision and answer to this question; although it previously denied protestants a hearing to present evidence and testimony thereon. This Court either refused to review the exercise of discretion by the Authority in determining feasibility of either or both of the proposed turnpikes; or upon review, this Court undertook to approve and uphold the exercise of such discretion by the Authority. Protestants alleged and sought an opportunity to prove by evidence and testimony that such determination was unlawful, in reckless disregard of controlling facts and applicable law, and constituted a clear abuse of discretion, which hearing was summarily denied by this Court, all in contravention of law and the due process clause of the United States Constitution. This Court is authorized and required by law to review the purported exercise of discretion by a department or agency of the State for alleged abuse thereof, and to hear and receive evidence and testimony upon the issue. In its answer to this question this Court stated in the opinion that the Authority should . . . "observe the best tests, checks, studies and reports available . . ." in determining whether a proposed turnpike was feasible and economically sound, as required by the Statutes of Oklahoma. Protestant alleged and sought to prove that the Authority did not do so, and its failure constituted an abuse of discretion, which should be set aside by the Court upon review. The Court denied protestant an opportunity to prove those allegations by evidence and testimony on a full and fair hearing, and thereupon approved the Authority's purported determination that the proposed turnpikes were feasible and economically sound. Such action and decision by this Court upon this question was clearly erroneous, was contrary to law, and contravened the due process clause of the United States Constitution.

* * * * * * *

(12) The decision of the Court as to the Sixth and Seventh Questions is erroneous in whole or in part.

* * * * * * *

The decision of the Court as to these questions is further erroneous and contrary to the United States Constitution and the Constitution and Laws of Oklahoma. This Court undertook to decide questions of fact and to assume the existence of facts as a necessary basis for the decision and answer, having previously denied protestants a hearing to present evidence and testimony thereon. In the decision the Court decides or assumes facts relating to the nature and purpose of certain roads agreed to be constructed by the Highway Department in connection with the respective turnpike projects. The Court purports to decide that these roads are not lead roads or access roads, which by statute are to be built exclusively with turnpike funds. The purported facts assumed or decided by the Court as a necessary basis for its answer to the Sixth and Seventh Questions are not true, are not supported by any evidence, and are contrary to the evidence. Protestants alleged and sought a hearing to prove by evidence and testimony that all or some of these highways were in fact access roads or lead roads, which by law must be constructed exclusively with turnpike funds. This Court denied protestant a hearing and an opportunity to present evidence and testimony on the issue. The decision of the Court that those roads are not lead roads or access roads, and construction thereof by the Highway Department was lawful and valid and was clearly erroneous, was contrary to law, and contravened the due process clause of the United States Constitution.

* * * * * * *

(14) The decision of the Court as to the Ninth Question decides or assumes facts as to the combining of two turnpike projects into one unit as an essential basis to

the answer, upon which issues of fact protestant sought a hearing and an opportunity to present evidence and testimony. Such action and decision was contrary to law and in contravention of the due process clause of the United States Constitution.

WHEREFORE, protestant respectfully prays the Court to grant a rehearing upon and reconsideration of the decision and opinion of this Court entered in this cause on January 26, 1961; to withdraw the opinion and decision filed on that date; to grant oral argument upon rehearing; and upon rehearing and reconsideration of this cause, and the questions and issues presented herein, to render and enter a new decision and opinion herein correctly deciding and determining the issues herein, eliminating the erroneous and incorrect portions of the decision and opinion heretofore entered herein, and clarifying the decision and opinion as to matters not fully and clearly decided therein.

Protestant further respectfully renews his application and request to refer this cause to a referee of this Court for the purpose of taking evidence and hearing testimony upon questions and issues of fact essential to the determination and adjudication of the controlling questions and issues of law raised and involved in this action.

BILL HOOVER, PROTESTANT
By Charles R. Nesbitt
Of Counsel